54A Am. Jur. 2d Mortgages Summary

American Jurisprudence, Second Edition | May 2021 Update

Mortgages
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Correlation Table

Summary

Scope:
This article deals with the transfer or encumbrance of real property as security for the payment of a debt or the performance of an obligation, the rights and obligations arising therefrom, and the enforcement of such rights and obligations. Included is discussion of instruments of conveyance of realty intended to operate by way of security but not in form a mortgage, deeds of trust, absolute deeds in the nature of mortgages, and equitable mortgages. The article deals tangentially with recording laws (in its discussion of priorities); this subject is primarily addressed in another article (Am. Jur. 2d, Records and Recording Laws §§ 1 et seq.).

There are numerous federal statutes concerning mortgages. This article includes discussion of the Alternative Mortgage Transaction Parity Act, statutes regulating multifamily mortgage foreclosures, and the Emergency Homeowners' Relief Act.

Treated Elsewhere:
Adjoining landowners, rights and duties of, see Am. Jur. 2d, Adjoining Landowners §§ 1 et seq.

Advancement as presumed when parent takes mortgage as security for money or other property transferred to child, see Am. Jur. 2d, Advancements § 80

Adverse possession as operating to secure title to realty in favor of, or against mortgagor or mortgagee, see Am. Jur. 2d, Adverse Possession §§ 157, 213 to 216

Alteration of mortgage as affecting rights of parties thereto, see Am. Jur. 2d, Alteration of Instruments §§ 18, 28, 37

Assignments for the benefit of creditors, effect upon mortgage or effect of mortgage upon, see Am. Jur. 2d, Assignments for Benefit of Creditors §§ 2, 83, 84

Attachment of mortgagor's interest in mortgaged realty, see Am. Jur. 2d, Attachment and Garnishment § 116

Bankruptcy, rights of mortgagors and mortgagees in, see Am. Jur. 2d, Bankruptcy §§ 1 et seq.

Building and construction contracts and work, see Am. Jur. 2d, Building and Construction Contracts §§ 1 et seq.

Civil rights with respect to housing discrimination, see Am. Jur. 2d, Civil Rights §§ 377 to 490

Contracts for sale and purchase of realty, generally, see Am. Jur. 2d, Vendor and Purchaser §§ 1 et seq.

Cotenant as bound by mortgage not executed by him or her, see Am. Jur. 2d, Cotenancy and Joint Ownership § 101

Covenants, conditions, and restrictions expressed or implied in conveyances of realty, see Am. Jur. 2d, Covenants, Conditions, and Restrictions §§ 1 et seq.

Damages recoverable by mortgagee for invalid mortgage interest due to defective abstract of title, see Am. Jur. 2d, Abstracts of Title § 34

Deeds and conveyances, generally, see Am. Jur. 2d, Deeds §§ 1 et seq.

Easements and licenses in realty, see Am. Jur. 2d, Easements and Licenses in Real Property §§ 1 et seq.

Escrow, generally, see Am. Jur. 2d, Escrow §§ 1 et seq.

Fraud and deceit, actions for damages relating to mortgages or procurement or advertising thereof, see Am. Jur. 2d, Fraud and Deceit §§ 98, 102, 223, 422; Am. Jur. 2d, Fraudulent Conveyances and Transfers §§ 1 et seq.

Home Mortgage Disclosure Act, see Am. Jur. 2d, Consumer and Borrower Protection §§ 218 to 220

Homestead exemption as against claims of creditors, see Am. Jur. 2d, Homestead §§ 1 et seq.

Interest rates allowable, generally, see Am. Jur. 2d, Interest and Usury §§ 33 to 40

Liens, generally, see Am. Jur. 2d, Liens §§ 1 et seq.

Life tenancy, mortgage of real property subject to, see Am. Jur. 2d, Life Tenants and Remaindermen §§ 116 to 120

Quiet title actions, see Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

Real Estate Settlement Procedures Act, see Am. Jur. 2d, Consumer and Borrower Protection §§ 210 to 217

Recording or filing of mortgage interest, lien, or discharge, generally, see Am. Jur. 2d, Records and Recording Laws §§ 1 et seq.

Reformation of mortgage instrument, generally, see Am. Jur. 2d, Reformation of Instruments §§ 1 et seq.

Restraint upon alienation, mortgage acceleration provisions as, see Am. Jur. 2d, Perpetuities and Restraints on Alienation § 116

Severance of joint tenancy, mortgage as effecting, see Am. Jur. 2d, Cotenancy and Joint Ownership § 26

Ship mortgages, see Am. Jur. 2d, Shipping §§ 140 to 168

Statute of frauds, applicability and application to mortgages, see Am. Jur. 2d, Statute of Frauds §§ 1 et seq.

Subrogation, application of doctrine to mortgages, see Am. Jur. 2d, Subrogation §§ 51 to 59

Title insurance, see Am. Jur. 2d, Insurance §§ 518 to 520

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I. In General

A. Definitions and Distinctions, in General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 701, 711 to 718, 892, 1634

A.L.R. Library

A.L.R. Index, Mortgages
West's A.L.R. Digest, Mortgages and Deeds of Trust 701, 711 to 718, 892, 1634

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I. In General

A. Definitions and Distinctions, in General

§ 1. Definition and nature of mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 711 to 718, 892

In property law, there is a distinction between "lien theory" and "title theory" jurisdictions for mortgages and deeds of trust.[1] In a title theory jurisdiction a mortgage is viewed as a form of title to property.[2] A mortgage is a conveyance of title to property that is given as security for the payment of a debt[3] and more specifically, a mortgage is often considered a conditional conveyance vesting the legal title in the mortgagee, with only the equity of redemption remaining in the mortgagor.[4] In other words, a "mortgage" is in essence a defeasible deed, requiring the grantee to reconvey the property held as security to the grantor upon satisfaction of the underlying debt or fulfillment of established conditions.[5]

Observation:

A lien cannot exist in the absence of the debt, the payment of which it secures.[6] Thus, a mortgage cannot exist separately from the underlying note.[7]

In some jurisdictions, a mortgage is not a conveyance,[8] but is merely security for a debt or obligation[9] or is merely a lien upon property[10] and gives the mortgagee no right of possession or control.[11] It has also been stated that a mortgage is a contract by which specific real property capable of being transferred is hypothecated for the performance of an act without requiring a change in possession and includes a transfer of an interest in real property made only to secure the performance of an act.[12]

A mortgage agreement is a contract;[13] as such, the individual parties have a right to define their mutual rights and obligations.[14]

A mortgage, while it may provide security for a negotiable instrument, is not a "negotiable instrument."[15]

A "deed of trust" is a conveyance of an interest in real property to secure a debt.[16] The function and purpose of deeds of trust and mortgages are identical;[17] a deed of trust in real property given as security for debt is a mortgage.[18]

Distinction:

The primary differences between a mortgage and a deed of trust are that a mortgage conveys property directly to the creditor, while a deed of trust conveys the property to a third party in trust for the benefit of the creditor.[19]

Footnotes

1 In re Boyd, 595 B.R. 402 (Bankr. C.D. Cal. 2018).

2 In re Giacchetti, 584 B.R. 441 (Bankr. D. Mass. 2018) (under Massachusetts law); GHB Construction and Development Company, Inc. v. West Alabama Bank and Trust, 290 So. 3d 793 (Ala. 2019); RCN Capital, LLC v. Sunford Properties and Development, LLC, 196 Conn. App. 823, 2020 WL 1847607 (2020); Premier Bank v. J.D. Homes of Olathe, Inc., 30 Kan. App. 2d 898, 50 P.3d 517 (2002); Note Capital Group, Inc. v. Perretta, 207 A.3d 998, 99 U.C.C. Rep. Serv. 2d 32 (R.I. 2019).

3 Ankerman v. Mancuso, 271 Conn. 772, 860 A.2d 244 (2004).

4 Johnson v. McNeil, 2002 ME 99, 800 A.2d 702 (Me. 2002).

5 Pines v. Farrell, 577 Pa. 564, 848 A.2d 94 (2004).
A mortgage is a conveyance of the property giving the mortgagee title to the land subject to defeasance upon performance of the condition. First Illinois Bank & Trust v. Brothers, 1999 Mass. App. Div. 63, 1999 WL 788689 (1999).

6 Westin Hills West Three Townhome Owners Ass'n v. Federal Nat. Mortg. Ass'n, 283 Neb. 960, 814 N.W.2d 378 (2012).

7 Livonia Property Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C., 717 F. Supp. 2d 724 (E.D. Mich. 2010), stay pending appeal denied, (June 14, 2010) and order aff'd, 399 Fed. Appx. 97 (6th Cir. 2010).

8 Columbus Investments v. Lewis, 48 P.3d 1222, 48 U.C.C. Rep. Serv. 2d 347 (Colo. 2002).

9 Perry v. Fairbanks Capital Corp., 888 So. 2d 725 (Fla. 5th DCA 2004); Aames Capital Corp. v. Interstate Bank of Oak Forest, 315 Ill. App. 3d 700, 248 Ill. Dec. 565, 734 N.E.2d 493 (2d Dist. 2000); Pramco III, LLC v. Yoder, 874 N.E.2d 1006 (Ind. Ct. App. 2007); Estate of Hammerle v. Director, Div. of Taxation, 22 N.J. Tax 342, 2005 WL 1278572 (2005); Corey v. Collins, 10 A.D.3d 341, 782 N.Y.S.2d 51 (1st Dep't 2004); Fifth Third Bank v. Hopkins, 177 Ohio App. 3d 114, 2008-Ohio-2959, 894 N.E.2d 65 (9th Dist. Summit County 2008).
A mortgage is a security instrument in the nature of a contract. Bank of Wichitas v. Ledford, 2006 OK 73, 151 P.3d 103 (Okla. 2006).

10 Sanchez v. Black, Srebnick, Kornspan Stumpf, P.A., 911 So. 2d 201 (Fla. 3d DCA 2005); Aames Capital Corp. v. Interstate Bank of Oak Forest, 315 Ill. App. 3d 700, 248 Ill. Dec. 565, 734 N.E.2d 493 (2d Dist. 2000); Premier Bank v. J.D. Homes of Olathe, Inc., 30 Kan. App. 2d 898, 50 P.3d 517 (2002); Smith v. Andre, 43 A.D.3d 770, 843 N.Y.S.2d 209 (1st Dep't 2007).

[11] Premier Bank v. J.D. Homes of Olathe, Inc., 30 Kan. App. 2d 898, 50 P.3d 517 (2002); Kramer v. Angel's Path, L.L.C., 174 Ohio App. 3d 359, 2007-Ohio-7099, 882 N.E.2d 46 (6th Dist. Erie County 2007).
A mortgage creates no estate in the land, but is merely a lien on the mortgaged premises. Smith v. Andre, 43 A.D.3d 770, 843 N.Y.S.2d 209 (1st Dep't 2007).

[12] Tilt-Up Concrete, Inc. v. Star City/Federal, Inc., 261 Neb. 64, 621 N.W.2d 502 (2001); Wagner v. Wagner, 2000 ND 132, 612 N.W.2d 555 (N.D. 2000).

[13] Gibson v. Neu, 867 N.E.2d 188 (Ind. Ct. App. 2007); Bank of Wichitas v. Ledford, 2006 OK 73, 151 P.3d 103 (Okla. 2006).

[14] Gibson v. Neu, 867 N.E.2d 188 (Ind. Ct. App. 2007).

[15] First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829 (Ky. Ct. App. 2000).

[16] § 109.

[17] Aviel v. Ng, 161 Cal. App. 4th 809, 74 Cal. Rptr. 3d 200 (1st Dist. 2008).

[18] Columbus Investments v. Lewis, 48 P.3d 1222, 48 U.C.C. Rep. Serv. 2d 347 (Colo. 2002); Conrad/Dommel, LLC v. West Development Co., 149 Md. App. 239, 815 A.2d 828 (2003).

[19] Wellington Co., Inc. Profit Sharing Plan and Trust v. Shakiba, 180 Md. App. 576, 952 A.2d 328 (2008).
Parties to a mortgage, generally, see § 11.

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I. In General

A. Definitions and Distinctions, in General

§ 2. Continuity of mortgages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 701, 711

An axiom frequently referred to in cases involving mortgages is "once a mortgage, always a mortgage."[1] The rule has been applied to an equitable mortgage.[2] It appears to be generally accepted, however, that the doctrine "once a mortgage, always a mortgage" has reference only to agreements entered into with the execution of the mortgage, and does not prevent the parties from subsequently entering into agreements which change the character of the instrument.[3]

Footnotes

1 Peugh v. Davis, 96 U.S. 332, 24 L. Ed. 775, 1877 WL 18507 (1877); Home Owners' Loan Corporation v. Dalton, 148 Kan. 580, 83 P.2d 624 (1938); Selik v. Goldman Realty Co., 240 Mich. 612, 216 N.W. 422 (1927); Elling v. Fine, 53 Mont. 481, 164 P. 891 (1917); First Nat. Bank v. Sargent, 65 Neb. 594, 91 N.W. 595 (1902); Smith v. Headlee, 93 Or. 257, 183 P. 20 (1919); Plummer v. Ilse, 41 Wash. 5, 82 P. 1009 (1905); Froidevaux v. Jordan, 64 W. Va. 388, 62 S.E. 686 (1908).

2 Gould v. McKillip, 55 Wyo. 251, 99 P.2d 67, 129 A.L.R. 1427 (1940).
Equitable mortgages, generally, see § 74.

3 De Voigne v. Chicago Title & Trust Co., 304 Ill. 177, 136 N.E. 498 (1922); Sears v. Gilman, 199 Mass. 384, 85 N.E. 466 (1908); Sauer v. Fischer, 247 Mich. 283, 225 N.W. 518, 65 A.L.R. 766 (1929); Haynes v. Rosenfield, 1924 OK 264, 99 Okla. 158, 225 P. 975 (1924).

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I. In General

A. Definitions and Distinctions, in General

§ 3. Estoppel to assert invalidity of mortgage; waiver

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 1634

In a particular case, the circumstances may be such as to estop the mortgagor from asserting the invalidity of a mortgage.[1] Similarly, a mortgagee may be estopped from enforcing its rights based on representations made by it and relied upon by the mortgagor to his or her detriment[2] or by any matter which would make it inequitable to assert rights under the mortgage against certain persons.[3]

Footnotes

1 Jerome v. McCarter, 94 U.S. 734, 24 L. Ed. 136, 1876 WL 19499 (1876) (where a junior mortgage is made expressly subject to prior mortgages, it is not admissible for the mortgagor to deny their existence or validity); Rothschild v. Title Guarantee & Trust Co., 204 N.Y. 458, 97 N.E. 879 (1912) (payment by the owner of property of interest on a mortgage thereon to which his or her signature was forged estops him or her from subsequently contesting the validity of the instrument).

2 State ex rel. Farm Credit Bank of Spokane v. District Court of Third Judicial Dist. of State in and for County of Powell, 267 Mont. 1, 881 P.2d 594 (1994).

3 Federal Land Bank of New Orleans v. First Nat. Bank, 237 Ala. 84, 185 So. 414 (1938); Second Nat. Bank v. Gilbert, 174 Ill. 485, 51 N.E. 584 (1898).
Effect of fraud, undue influence or duress, generally, see §§ 26 to 28.

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I. In General

B. Law Applicable

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 703, 704, 706 to 708

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West's A.L.R. Digest, Mortgages and Deeds of Trust 703, 704, 706 to 708

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I. In General

B. Law Applicable

§ 4. Law applicable to mortgages, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 706, 707

The law in force at the time a mortgage is executed, with all the conditions and limitations that it imposes, is the law which determines the force and effect of the mortgage.[1]

Footnotes

[1] Bradley v. Lightcap, 195 U.S. 1, 24 S. Ct. 748, 49 L. Ed. 65 (1904); Faxon v. All Persons, etc., 166 Cal. 707, 137 P. 919 (1913); People v. Perlowski, 251 Ill. App. 506, 1929 WL 28353 (1st Dist. 1929); State ex rel. Cleveringa v. Klein, 63 N.D. 514, 249 N.W. 118, 86 A.L.R. 1523 (1933); Womble v. Shirley, 193 S.W. 719 (Tex. Civ. App. Amarillo 1917).

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I. In General

B. Law Applicable

§ 5. Constitutional guarantees applicable to mortgages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 703, 704

The right to mortgage one's property is within the constitutional guarantee of freedom of contract.[1] Any statutory changes in the law which impose conditions and restrictions on a mortgagee in the enforcement of his or her right and which affect its substance are invalid as impairing the obligation and cannot prevail.[2] Changes in the remedies available for the enforcement of a mortgage may not, even when the public welfare is invoked as an excuse, be pressed so far as to lessen the security of a mortgage without moderation or reason or in a spirit of oppression.[3] Thus, the law will not permit changes to be made by statute which direct that decrees be made on a longer period of credit than was allowed at the date of the mortgage[4] or which alter the right of a mortgagee to sale on foreclosure subject only to the redemption provided for by the law in force when the mortgage was made.[5]

A constitutional amendment allowing homeowners to obtain home equity loans on homestead property and altering provisions for imposing mechanics' liens on homestead property does not interfere with interstate commerce in violation of the federal commerce clause.[6]

Footnotes

1 Scottish American Mortg. Co. v. Minidoka County, 47 Idaho 33, 272 P. 498, 65 A.L.R. 663 (1928); Dennis v. Moses, 18 Wash. 537, 52 P. 333 (1898).

2 Barnitz v. Beverly, 163 U.S. 118, 16 S. Ct. 1042, 41 L. Ed. 93 (1896); People v. Perlowski, 251 Ill. App. 506, 1929 WL 28353 (1st Dist. 1929).

3 W.B. Worthen Co. ex rel. Bd. of Com'rs of Street Imp. Dist. No. 513 of Little Rock, Ark. v. Kavanaugh, 295 U.S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A.L.R. 905 (1935).

[4] Womble v. Shirley, 193 S.W. 719 (Tex. Civ. App. Amarillo 1917).

[5] Connecticut Mut. Life Ins. Co. v. Cushman, 108 U.S. 51, 2 S. Ct. 236, 27 L. Ed. 648 (1883); Womble v. Shirley, 193 S.W. 719 (Tex. Civ. App. Amarillo 1917); Swinburne v. Mills, 17 Wash. 611, 50 P. 489 (1897).

[6] Rooms With a View, Inc. v. Private Nat. Mortg. Ass'n, Inc., 7 S.W.3d 840 (Tex. App. Austin 1999) (disapproved of on other grounds by, Dacus v. Parker, 466 S.W.3d 820 (Tex. 2015)).

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I. In General

B. Law Applicable

§ 6. Federal legislation applicable to mortgages

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West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 703, 708

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Validity, Construction, and Application of Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C.A. secs. 3801 et seq., 7 A.L.R. Fed. 2d 151

Trial Strategy

Proof Under The Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

Real Estate Broker's Recovery of Commission When Buyer or Seller Defaults on Contract of Sale, 91 Am. Jur. Proof of Facts 3d 1

There are many federal statutes relating to mortgages.[1]

The Alternative Mortgage Transaction Parity Act represents congressional response to the concern, amongst others, that state bans on mortgages other than traditional fixed-rate mortgages would reduce overall availability of mortgage credit, since fixed-rate mortgages had become relatively more expensive as a result of increased interest rate volatility.[2] Specifically, Congress has provided that in order to prevent discrimination against state-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making, purchasing, and enforcing alternative mortgage

transactions, housing creditors may make, purchase, and enforce alternative mortgage transactions.[3] An alternative mortgage transaction is defined as a loan or credit sale secured by an interest in residential real property, a dwelling, all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a residential manufactured home (as that term is defined by statute),[4] in which the interest rate or finance charge may be adjusted or renegotiated, described and defined by applicable regulation.[5] Any adjustable rate mortgage loan originated by a creditor must include a limitation on the maximum interest rate that may apply during the term of the mortgage loan.[6]

The Supremacy Clause of the United States Constitution does not prevent extinguishment of a deed of trust simply because the deed of trust is federally insured.[7]

Footnotes

1 12 U.S.C.A. § 375a (mortgages to executive officers of Federal Reserve Banks); 12 U.S.C.A. § 1715z-23 (HOPE Program); 12 U.S.C.A. §§ 1749aaa to 1749aaa-5 (group-practice facilities mortgage insurance); 12 U.S.C.A. §§ 2701 to 2712 (emergency homeowners' relief); 12 U.S.C.A. §§ 3701 to 3717 (multifamily mortgage foreclosures); 12 U.S.C.A. §§ 5101 to 5117 (secure and fair enforcement for mortgage licensing); 15 U.S.C.A. § 1701 (interstate land sales, "blanket encumbrance"); 19 U.S.C.A. § 1916 (recording trade-expansion mortgages); 28 U.S.C.A. § 2410 (United States as party to action respecting mortgage); 42 U.S.C.A. § 3374 (foreclosure on property at or near military base).

2 Grunbeck v. Dime Sav. Bank of New York, FSB, 74 F.3d 331 (1st Cir. 1996).

3 12 U.S.C.A. § 3803(a).

4 42 U.S.C.A. § 5402(6).

5 12 U.S.C.A. § 3802(1).

6 12 U.S.C.A. § 3806(a).

7 Bank of America, N.A. v. Inspirada Community Association, 376 F. Supp. 3d 1077 (D. Nev. 2019).

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I. In General

C. Construction and Interpretation

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Evidence 423(4), 461(2)

West's Key Number Digest, Mortgages and Deeds of Trust 851 to 865

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I. In General

C. Construction and Interpretation

§ 7. Construction and interpretation of mortgages, generally

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West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 851 to 865

Construction of a mortgage or a mortgage deed is governed by the same rules of interpretation that apply to written instruments or contracts generally[1] and to deeds particularly.[2] The primary rule of mortgage construction is to ascertain the intention of the parties.[3]

As is true in the interpretation of all written agreements, the language of the mortgage and supporting instruments, unless it is ambiguous, represents the intention of the parties and is controlling.[4] Mortgage agreements are enforced as written, barring some contravention of public policy.[5]

In construing a mortgage, a court must consider the language and terms of the instrument as a whole;[6] moreover, the words in the deed are to be given their ordinary popular meaning, unless their context, or the circumstances, show that a special meaning was intended.[7]

In interpreting the agreements, however, ambiguities are construed in favor of the debtor.[8] To put it another way, any ambiguity in a mortgage instrument should be construed against the party drawing the documents, or in other words, against the party who supplies the words[9] (generally the lender).

Footnotes

[1] Waddell v. U.S. Bank National Association, 395 F. Supp. 3d 676 (E.D. N.C. 2019) (deeds of trust, under North Carolina law); Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. App. 2005) (deeds of trust); Hudson City Savings Bank v. Hellman, 196 Conn. App. 836, 2020 WL 1847608 (2020); Green Emerald Homes, LLC v. 21st Mortgage Corporation, 2019 WL 2398015 (Fla. 2d DCA 2019); Blair Const., Inc. v. McBeth, 273 Kan. 679, 44 P.3d 1244 (2002); Calomiris v. Woods, 353 Md. 425, 727 A.2d 358 (1999); Graham-Rogers v. Wells Fargo Bank,

N.A., 2019 MT 226, 397 Mont. 262, 449 P.3d 798 (2019) (deeds of trust); Gilroy v. Ryberg, 266 Neb. 617, 667 N.W.2d 544 (2003) (deeds of trust); Bank of Wichitas v. Ledford, 2006 OK 73, 151 P.3d 103 (Okla. 2006); Robinson v. Saxon Mortgage Services, Inc., 240 S.W.3d 311 (Tex. App. Austin 2007) (deeds of trust).

[2] Hudson City Savings Bank v. Hellman, 196 Conn. App. 836, 2020 WL 1847608 (2020); EQT Production Company v. Big Sandy Company, L.P., 590 S.W.3d 275 (Ky. Ct. App. 2019).

[3] Wells Fargo Bank, N.A. v. Fitzpatrick, 190 Conn. App. 231, 210 A.3d 88 (2019), certification denied, 332 Conn. 912, 209 A.3d 1232 (2019); Sunset Mortg. v. Agolio, 109 Conn. App. 198, 952 A.2d 65 (2008); Mike's Furniture Barn, Inc. v. Smith, 342 Ga. App. 558, 803 S.E.2d 800 (2017) (security deeds); Federal Land Bank of Wichita v. Krug, 253 Kan. 307, 856 P.2d 111 (1993); Melson v. Traxler, 356 S.W.3d 264 (Mo. Ct. App. W.D. 2011) (deeds of trust); Adams v. First Nat. Bank of Bells/Savoy, 154 S.W.3d 859 (Tex. App. Dallas 2005).

[4] Gibson v. Neu, 867 N.E.2d 188 (Ind. Ct. App. 2007).
Ascertaining the intention of parties is done by reading the language of the documents when the terms are plain and unambiguous. Benton v. Patel, 257 Ga. 669, 362 S.E.2d 217 (1987); Home State Bank v. Johnson, 240 Kan. 417, 729 P.2d 1225 (1986).
Parol evidence where mortgage is ambiguous, see § 9.

[5] Custer v. Homeside Lending, Inc., 858 So. 2d 233 (Ala. 2003).

[6] Emigrant Mortg., Co., Inc. v. D'Agostino, 94 Conn. App. 793, 896 A.2d 814 (2006); Archer v. Skokan, 70 A.D.3d 877, 897 N.Y.S.2d 127 (2d Dep't 2010); Adams v. First Nat. Bank of Bells/Savoy, 154 S.W.3d 859 (Tex. App. Dallas 2005) (deed of trust).

[7] Wells Fargo Bank, N.A. v. Fitzpatrick, 190 Conn. App. 231, 210 A.3d 88 (2019), certification denied, 332 Conn. 912, 209 A.3d 1232 (2019).
Words in a deed of trust should be given their plain meaning based on the way they are used, unless it appears that doing so would defeat the intention of the parties. Adams v. First Nat. Bank of Bells/Savoy, 154 S.W.3d 859 (Tex. App. Dallas 2005).

[8] Moening v. Alaska Mut. Bank, 751 P.2d 5 (Alaska 1988); Schaeffer v. Chapman, 176 Ariz. 326, 861 P.2d 611 (1993).

[9] Hungate v. Law Office of David B. Rosen, 139 Haw. 394, 391 P.3d 1 (2017).

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I. In General

C. Construction and Interpretation

§ 8. Mutual construction of mortgages and deeds with notes and bonds

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 858

A mortgage and note are to be read together.[1] A note and mortgage are deemed parts of one transaction and must be construed together as such.[2] Similarly, a note and a deed of trust must be read and construed together,[3] at least when they are executed simultaneously and each contains references to the other.[4]

Instruments executed at the same time as a mortgage, and intended to be a part of the same transaction, will be treated as a part thereof;[5] such documents should be construed or read together to determine and give effect to the intention of the parties.[6]

Where there is an irreconcilable difference between notes or bonds and mortgages or deeds of trust given to secure them, the former control.[7]

Footnotes

1 Kattar v. Demoulas, 433 Mass. 1, 739 N.E.2d 246 (2000).

2 Wells Fargo Bank, N.A. v. Fitzpatrick, 190 Conn. App. 231, 210 A.3d 88 (2019), certification denied, 332 Conn. 912, 209 A.3d 1232 (2019).
A choice of law provision contained in mortgages, which provided that the mortgages were governed by federal law and the law of the jurisdiction in which the property was located, was incorporated by reference to promissory notes executed in connection with the loans. Newburyport Five Cents Sav. Bank v. MacDonald, 48 Mass. App. Ct. 904, 718 N.E.2d 404 (1999).

3 In re Crystal Properties, Ltd., L.P., 268 F.3d 743 (9th Cir. 2001); Robinson v. Saxon Mortgage Services, Inc., 240 S.W.3d 311 (Tex. App. Austin 2007).
Deeds of trust, generally, see §§ 109 to 121.

[4] In re Clayton, 254 N.C. App. 661, 802 S.E.2d 920 (2017), review denied, cert. denied, 370 N.C. 577, 809 S.E.2d 866 (2018).

[5] Wranovics v. Finnerty, 277 A.D.2d 841, 716 N.Y.S.2d 799 (3d Dep't 2000).

[6] Reverse Mortgage Solutions, Inc. v. Nunez, 598 B.R. 876 (S.D. Fla. 2019), appeal dismissed, 2020 WL 4577120 (11th Cir. 2020) (Under Florida law); Sardon Foundation v. New Horizons Service Dogs, Inc., 852 So. 2d 416 (Fla. 5th DCA 2003); Adams v. First Nat. Bank of Bells/Savoy, 154 S.W.3d 859 (Tex. App. Dallas 2005) (promissory note and deed of trust were signed by the same parties on the same day, they identified the same subject matter, each document referenced the other, and the deed of trust was identified as the security for the note); Tretheway v. Furstenau, 2001 UT App 400, 40 P.3d 649 (Utah Ct. App. 2001) (promissory note and trust deed would be construed as a whole, where they were executed on same day and related to same transaction).

[7] First Interstate Bank of Fargo, N.A. v. Rebarchek, 511 N.W.2d 235 (N.D. 1994); Ferguson v. Peoples Nat. Bank of LaFollette, 800 S.W.2d 181 (Tenn. 1990).

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I. In General

C. Construction and Interpretation

§ 9. Parol evidence as aid in interpretation of mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Evidence 423(4), 461(2)

Trial Strategy

Proof That Grantor Intended Deed as Mortgage, 79 Am. Jur. Proof of Facts 3d 109

Extrinsic evidence to aid in the interpretation of a mortgage is admissible where the instrument is ambiguous and susceptible of different constructions.[1] However, when the intent of the parties is set forth in definite and precise language of the mortgage, then the document must be enforced without resort to extrinsic evidence.[2] In other words, where the language of the mortgage is inescapably clear, unambiguous, and permits but one conclusion as to the intent of the parties, parol evidence is not admissible for the purpose of interpretation or construction.[3] Parol evidence is not competent for the purpose of varying a written contract expressed in a mortgage.[4]

Practice Tip:

Absent proof to the contrary, there is a presumption that the documents prepared by the attorney for a vendor/mortgagee accurately memorialize his or her wishes.[5]

It is necessary to look beyond the four corners of some conveyances; in the absence of a statutory provision to the contrary, parol evidence is admissible to show that a deed absolute in form was intended as a mortgage.[6]

Footnotes

1 Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 94 P. 900 (1908).
A provision in a real-property mortgage which stated that the acceleration clause would control any contrary provision, clearly manifested the predominance of the acceleration clause over a separate clause providing for a discount in the event the mortgage was paid in full before a certain date, and therefore parol evidence was not available to establish a contrary intent of the parties. Quiring v. Plackard, 412 So. 2d 415 (Fla. 3d DCA 1982).

2 Wilshire Credit Corp. v. Ghostlaw, 300 A.D.2d 971, 753 N.Y.S.2d 537 (3d Dep't 2002).

3 Leitman v. Baldwin, 57 A.D.2d 944, 395 N.Y.S.2d 87 (2d Dep't 1977).
Resort to the maxims of contract construction was not available to create an ambiguity in the clear and unambiguous language of mortgage agreements regarding the fees and charges which the mortgagee was authorized to collect. Colangelo v. Norwest Mortg., Inc., 598 N.W.2d 14 (Minn. Ct. App. 1999).

4 Veve y Diaz v. Sanchez, 226 U.S. 234, 33 S. Ct. 36, 57 L. Ed. 201 (1912) (referring to a mortgage executed in Puerto Rico); Jackson v. Parker, 153 Fla. 622, 15 So. 2d 451 (1943); Mills Co. Nat. Bank v. Perry, 72 Iowa 15, 33 N.W. 341 (1887); Isett v. Lucas, 17 Iowa 503, 1864 WL 361 (1864).

5 Wranovics v. Finnerty, 277 A.D.2d 841, 716 N.Y.S.2d 799 (3d Dep't 2000).

6 § 87.

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II. Requisites and Validity; Modification

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 732, 733, 744, 771 to 774, 871 to 879, 1131 to 1151

A.L.R. Library

A.L.R. Index, Mortgages
West's A.L.R. Digest, Mortgages and Deeds of Trust 732, 733, 744, 771 to 774, 871 to 879, 1131 to 1151

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II. Requisites and Validity; Modification

A. In General

§ 10. Creation of mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 732, 733, 744

A.L.R. Library

Duty and liability of trustee under mortgage, deed of trust, or other trust instrument, to holders of bonds or other obligations secured thereby, 90 A.L.R.2d 501

It has been said that no special formalities are required in order to create a mortgage; all that is necessary is a debt and an instrument that creates a lien on real property as security for the payment of the debt.[1] Nevertheless, there are legal requirements with respect to consideration for the transaction,[2] and the execution,[3] delivery and acceptance of the mortgage,[4] as well as the description both of the property and interest subject to the mortgage[5] and the obligations secured.[6]

Footnotes

1 Blair Const., Inc. v. McBeth, 273 Kan. 679, 44 P.3d 1244 (2002).

2 §§ 15 to 17.

3 §§ 18 to 22.

4 §§ 23 to 25.

[5] §§ 35 to 48.

[6] §§ 65 to 68.

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II. Requisites and Validity; Modification

A. In General

§ 11. Parties to mortgage or deed of trust

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 871 to 879

An instrument cannot operate as a mortgage unless there exist, as parties thereto, both a mortgagor and a mortgagee.[1] In particular cases, a mortgage may be rendered ineffective because of the absence of capacity of the mortgagor or mortgagee to execute or take the mortgage.[2]

A deed of trust is a three-party arrangement in which the borrower conveys title to an interest in real property to a third party to hold for the benefit of the lender until repayment of the loan.[3] In other words, there are three parties to a deed of trust: (1) the trustor, who owns the property; (2) the trustee, to whom the property is conveyed as security for the obligation of the trustor; and (3) the beneficiary, to whom the trustor owes the obligation.[4]

Footnotes

1 Menage v. Burke, 43 Minn. 211, 45 N.W. 155 (1890); Collins v. Collins, 51 Miss. 311, 1875 WL 6543 (1875); Shirley v. Burch, 16 Or. 83, 18 P. 351 (1888); Wiehl v. Robertson, 97 Tenn. 458, 37 S.W. 274 (1896).
Where the mortgage referred to the parties originally as mortgagor and mortgagee, then as grantor and grantee, and then reversed and referred to the mortgagor as grantee and the mortgagee as grantor; the court held that despite the inadequacies of the mortgage, the identity of the parties was clear from the circumstances surrounding the entire transaction and the obvious intentions of the parties. Connecticut Nat. Bank v. Kendall, 617 A.2d 544 (Me. 1992).

2 Putney v. Bryan, 142 Ga. 118, 82 S.E. 519 (1914); Capen v. Garrison, 193 Mo. 335, 92 S.W. 368 (1906).
Mortgages that an adult protected person entered into with a city mortgagee while the estate was under guardianship were void. City of Mishawaka v. Kvale, 810 N.E.2d 1129 (Ind. Ct. App. 2004).

3 Skinner v. Preferred Credit, 361 N.C. 114, 638 S.E.2d 203 (2006); Levine v. March, 266 S.W.3d 426 (Tenn. Ct. App. 2007).

Deeds of trust, generally, see §§ 109 to 121.

[4] Aviel v. Ng, 161 Cal. App. 4th 809, 74 Cal. Rptr. 3d 200 (1st Dist. 2008).

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II. Requisites and Validity; Modification

A. In General

§ 12. Validity of mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 740, 771, 772, 774

The validity of a mortgage depends upon whether it provides "reasonable notice" to third parties of the obligation that is secured.[1] However, even when this requisite is satisfied, a mortgage loan may be found to be invalid as a result of unconscionability,[2] fraud, duress, or undue influence.[3]

The validity of an encumbrance is determined as of the time it is executed.[4]

Observation:

A facially valid mortgage bears a strong presumption of validity[5] and the burden is on the party attacking the mortgage to prove its invalidity.[6]

The validity of a mortgage and the fact of its execution may be ratified.[7] Also, there are a number of situations wherein instruments which are not effective as mortgages at law will be regarded as such under equitable principles, and thus will be considered as binding on the parties as if mortgages in due form had been properly executed.; such instruments are known as equitable mortgages.[8] Finally, even where a mortgage is invalid, the right of a creditor to assert the invalidity may be denied in a particular case on the ground that the creditor has secured no judgment or legal process and does not have a right recognized by law to have the property seized and sold for his or her benefit.[9]

Footnotes

1 Connecticut Nat. Bank v. Esposito, 210 Conn. 221, 554 A.2d 735 (1989) (the purpose of such reasonable notice is to prevent parties that are not privy to the transaction from being defrauded or misled; a corollary of this position is that errors and omissions in the recorded mortgage that would not mislead a title searcher as to the true nature of the secured obligation do not affect the validity of the mortgage against third parties).
A senior mortgage containing a misspelling of mortgagor's name did not provide a junior mortgagee with constructive notice of the superior lien, although the computer system allowed for phonetic index searching in which the record containing an incorrect spelling of a name could presumably be discovered by the input of the name with a different spelling but similar pronouncement, where the incorrect indexing placed the recording of the senior mortgage outside chain of title. Coco v. Ranalletta, 189 Misc. 2d 535, 733 N.Y.S.2d 849 (Sup 2001).
Notice as affecting priority of interests, generally, see §§ 262 to 265.

2 § 13.

3 §§ 26 to 28.

4 Beal Bank v. Siems, 670 N.W.2d 119, 52 U.C.C. Rep. Serv. 2d 11 (Iowa 2003).

5 In re Zaptocky, 250 F.3d 1020, 2001 FED App. 0167P (6th Cir. 2001).

6 Pitti v. Pocono Business Furniture, Inc., 859 A.2d 523 (Pa. Commw. Ct. 2004).

7 Methvin v. American Sav. & Loan Ass'n of Anadarko, Okl., 1944 OK 177, 194 Okla. 288, 151 P.2d 370 (1944) (overruled in part on other grounds by, North v. Haning, 1950 OK 280, 204 Okla. 321, 229 P.2d 574 (1950)), holding that the validity of a mortgage on land and the fact of its execution by the mortgagors may be ratified and confirmed by procuring a second loan from the mortgagee upon the same security, resulting in the execution of a note and mortgage on the land which recognizes the existence of the former one in such a manner that the later one may be construed as "subject" thereto, and the former one as a valid prior encumbrance, especially where the act is followed by an assignment of the rents, duly executed, to the mortgagee.

8 § 74.

9 Leffek v. Luedeman, 95 Mont. 457, 27 P.2d 511, 91 A.L.R. 286 (1933).

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II. Requisites and Validity; Modification

A. In General

§ 13. Unconscionability of mortgage transaction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 773

A mortgage loan may be found to be invalid as a result of unconscionability.[1] The basic test for unconscionability as applied to real estate mortgages is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.[2] The amount of a mortgage loan, by itself, cannot establish that the loan documents are substantively unconscionable.[3]

Footnotes

1 Swayne v. Beebles Invests., Inc., 176 Ohio App. 3d 293, 2008-Ohio-1839, 891 N.E.2d 1216 (10th Dist. Franklin County 2008) (procedurally and substantively unconscionable).
A mortgage loan agreement between borrowers and a federal savings association, that did not obligate an association to pay interest on the funds that the borrowers deposited in a mortgage escrow account except as required by law or as otherwise negotiated by parties, was not a contract of adhesion, given evidence that the mortgage-lender marketplace was inhabited by lenders who did pay interest on mortgage escrow accounts, and that the contract specifically provided borrowers with an opportunity to negotiate with the association for the payment of interest. Flagg v. Yonkers Sav. and Loan Ass'n, FA, 396 F.3d 178 (2d Cir. 2005).
A mortgagor's allegations that the terms and conditions of a promissory note and mortgage were unconscionable because the mortgagor placed her trust and confidence in the mortgagee to make proper and timely disclosures, and properly qualify her for the loan, among other things, and that the mortgagor did not understand the terms of the loan and that the mortgagee, who had superior bargaining power over the mortgagor, did not inform her of the true terms of the loan, failed to state a claim against the mortgagee for unconscionability. Enriquez v. Countrywide Home Loans, FSB, 814 F. Supp. 2d 1042 (D. Haw. 2011) (under Hawai'i law).

2 Hirsch v. Woermer, 184 Conn. App. 583, 195 A.3d 1182 (2018), certification denied, 330 Conn. 938, 195 A.3d 384 (2018).

[3] In re Tillette, 557 B.R. 902 (Bankr. S.D. W. Va. 2016) (under West Virginia law).

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II. Requisites and Validity; Modification

A. In General

§ 14. Modification of mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 1131 to 1151

Forms

Am. Jur. Legal Forms 2d §§ 179:520 to 179:550 (Modification)

The general rules for the modification of contracts would seem to apply to a considerable extent to the modification of mortgages.[1] It has been held that except where there is a written agreement or provision that it cannot be changed orally, a mortgage may be modified by oral agreement.[2] A trustee under a deed of trust in the nature of a mortgage generally has, however, no authority to consent to the modification of the trust.[3]

A statute may regulate mortgage modification, as in the case of modification of mortgage loans when the mortgagor has an excessive mortgage payment-to-income ratio[4] or is in default.[5]

Footnotes

1 American Securities Co. v. Goldsberry, 69 Fla. 104, 69 Fla. 123, 67 So. 862, 1 A.L.R. 15 (1915); Flannery v. 15 West Forty-Fourth Street Co., 193 A.D. 63, 183 N.Y.S. 228 (1st Dep't 1920); Haase v. Blank, 177 Wis. 17, 187 N.W. 669, 21 A.L.R. 1543 (1922).

2 Arnot v. Union Salt Co., 186 N.Y. 501, 79 N.E. 719 (1906); Dodge v. Crandall, 30 N.Y. 294, 1864 WL 4140 (1864).

[3] Nelson v. Hubbard, 96 Ala. 238, 11 So. 428 (1892).
Deeds of trust, generally, see §§ 109 to 121.

[4] Thompson v. Bank of America, N.A., 773 F.3d 741 (6th Cir. 2014) (incentives to modify under Home Affordable Modification Program).

[5] Lopez v. Equifirst Corp., 2009 WL 3233912 (E.D. Cal. 2009).

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II. Requisites and Validity; Modification

B. Consideration

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 801 to 810

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II. Requisites and Validity; Modification

B. Consideration

§ 15. Consideration for mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 801 to 804, 806 to 810

Except as a statute may otherwise provide,[1] a mortgage is not valid and binding unless supported by sufficient[2] bargained-for[3] consideration.[4] The consideration for a mortgage can be either a benefit to the promisor or a detriment to the promisee.[5] Consideration exists if it is shown that any right, profit, or benefit accrued to the mortgagor or that responsibility was suffered or undertaken by another.[6] In addition, sufficient consideration will be found if it is shown that the mortgagee extends any forbearance in reliance upon the mortgage,[7] or suffered any damage, inconvenience, detriment, or loss.[8]

The consideration need not always move from the mortgagee to the mortgagor at the time of the execution of the mortgage and on the contrary, a precedent obligation or debt, as between the parties, is sufficient of itself to support the mortgage.[9] Also, the consideration for a mortgage may consist of a loan to a third person.[10]

Observation:

There is a presumption of consideration for an executed mortgage[11] or deed of trust.[12] Moreover, under some authority, the fact that a mortgage note was executed under seal is conclusive proof that it was supported by consideration.[13]

Footnotes

[1] GHB Construction and Development Company, Inc. v. West Alabama Bank and Trust, 290 So. 3d 793 (Ala. 2019).

[2] Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1 (Iowa 2002); Kennebunk Sav. Bank v. West, 538 A.2d 303 (Me. 1988); Allgood v. Allgood, 134 S.C. 233, 132 S.E. 48 (1926).

[3] Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 74 U.C.C. Rep. Serv. 2d 619 (Iowa 2011).

[4] Lily, Inc. v. Silco, LLC, 997 N.E.2d 1055 (Ind. Ct. App. 2013).
A deed of trust intended as a mortgage is within this rule. Turner v. Porter, 264 Ill. App. 15, 1931 WL 3197 (1st Dist. 1931), cert. denied.

[5] Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1 (Iowa 2002); Kennebunk Sav. Bank v. West, 538 A.2d 303 (Me. 1988); Bock v. Bank of Bellevue, 230 Neb. 908, 434 N.W.2d 310 (1989); First Nat. Bank and Trust Co. of Williston v. Brakken, 468 N.W.2d 633 (N.D. 1991).

[6] Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell, 848 N.E.2d 738 (Ind. Ct. App. 2006).

[7] Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell, 848 N.E.2d 738 (Ind. Ct. App. 2006); Sinnard v. Roach, 414 N.W.2d 100 (Iowa 1987) (holding that forbearance of the right to redeem CDs pledged to secure the old debt was sufficient consideration for a new mortgage); First Nat. Bank and Trust Co. of Williston v. Brakken, 468 N.W.2d 633 (N.D. 1991) (holding that giving up collection rights on previous notes in exchange for new notes and mortgages was sufficient consideration for the new mortgages); In re Clyde's Estate, 329 Pa. 552, 198 A. 640, 115 A.L.R. 1412 (1938) (holding that forbearance by a creditor of a decedent to bring an action by which his claim could have been established as a lien is ample consideration for a mortgage given in pursuance of an agreement that if the claim should be secured, no action would be brought).

[8] Lily, Inc. v. Silco, LLC, 997 N.E.2d 1055 (Ind. Ct. App. 2013).

[9] Ocklawaha River Farms Co. v. Young, 73 Fla. 159, 74 So. 644 (1917); Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1 (Iowa 2002); Greig v. Mueller, 66 Or. 27, 133 P. 94 (1913); Bankhead v. Shed, 80 S.C. 253, 61 S.E. 425 (1908).
A borrowers' antecedent debt to a lender served as valid consideration for subsequent deeds of trust. Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504 (Colo. App. 2006).
It cannot be argued that an antecedent debt, even that of someone other than the grantor, fails to provide sufficient consideration for a deed of trust. Ballard v. Commercial Bank of DeKalb, 991 So. 2d 1201 (Miss. 2008).

[10] Riddle v. La Salle Nat. Bank, 34 Ill. App. 2d 116, 180 N.E.2d 719 (1st Dist. 1962); Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1 (Iowa 2002); Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972); First Nat. Bank and Trust Co. of Williston v. Brakken, 468 N.W.2d 633 (N.D. 1991).
A mortgagor's execution of the mortgage was supported by sufficient consideration, where the mortgage benefited the business of her ex-husband, and the mortgagor was an officer of his corporation. Hathaway v. Tompkins, 8 Misc. 3d 260, 794 N.Y.S.2d 899 (Sup 2005).

[11] Mitchell Bank v. Schanke, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004) (the law still conclusively presumes consideration for an executed mortgage that was signed under seal).
Rebuttal of presumption, see § 16.
Execution, generally, see § 10.

[12] Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504 (Colo. App. 2006) (when an obligor signs a note and deed of trust, there is a presumption that the agreements are supported by valid consideration).
Deeds of trust, generally, see §§ 109 to 121.

[13] In re Rinaldi, 487 B.R. 516 (Bankr. E.D. Wis. 2013) (under Wisconsin law).

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II. Requisites and Validity; Modification

B. Consideration

§ 16. Failure of consideration for mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 805

A mortgage may be subject to a defense based upon a failure of consideration therefor.[1] However, under some authority, language preceding the executor of an estate's signature on a mortgage note, stating that the executor intends to be legally bound by the note, makes the note and the mortgage securing the note valid and binding, despite a purported lack of consideration.[2]

Practice Tip:

The presumption that a note and deed of trust agreements are supported by valid consideration may be rebutted upon a showing by the obligor of the absence of consideration, and once the obligor presents evidence tending to prove a lack of consideration, whether valid consideration existed becomes a question of fact.[3]

Footnotes

1 Glymph v. Smith, 180 S.C. 382, 185 S.E. 911, 105 A.L.R. 631 (1936).
A mortgage granted by a client to a certified public accountant (CPA) was void for lack of consideration, where there was no underlying obligation running from the client to the CPA individually, and there was no evidence that the parties intended for the mortgaged property to be held or transferred to secure any obligation of the client to the CPA,

as would support recognition of an equitable mortgage. Tornatore v. Bruno, 12 A.D.3d 1115, 785 N.Y.S.2d 820 (4th Dep't 2004).
A mortgage from parents to a corporation owned by their two sons, on a home in which the parents were living, was not supported by consideration; neither parent expressly agreed to pay for improvements that the sons had already made to the home, the sons never intended the parents would pay for the improvements, and the deed to the father was a gift not only of the home but also of the improvements. Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1 (Iowa 2002).
The check from the mortgage broker to the title company was dishonored due to insufficient funds, and thus, the mortgage failed. Lanco Title Agency, Inc. v. Mortgage Plus, Inc., 2004-Ohio-2267, 2004 WL 979827 (Ohio Ct. App. 4th Dist. Jackson County 2004).

[2] Nicholas v. Hofmann, 2017 PA Super 77, 158 A.3d 675 (2017).

[3] Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504 (Colo. App. 2006).
Presumption of valid consideration, see § 15.
Deeds of trust, generally, see §§ 109 to 121.

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II. Requisites and Validity; Modification

B. Consideration

§ 17. Application of consideration received for mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 801

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Duty and liability of trustee under mortgage, deed of trust, or other trust instrument, to holders of bonds or other obligations secured thereby, 90 A.L.R.2d 501

The failure of a trustee in a deed of trust intended as a mortgage, to see that the consideration for bonds secured thereby is paid to the right party, is a ground upon which recovery by a bondholder against the trustee may be based.[1] A trustee has also been held personally liable to bondholders for injuries occasioned by his failure to see that the money received by the mortgagor from the sale of bonds was applied in reducing prior encumbrances for which purpose the bonds were expressly issued.[2] Where the trustee, however, had no active duties to perform beyond the mere certification and delivery of the bonds on instructions from the board of directors of the mortgagor, and was expressly relieved from liability for either the collection or the expenditure of proceeds derived from the sale of the securities, the remedy of the bondholders for the misapplication of the proceeds has been held to be against the mortgagor, and not against the trustee.[3] A mortgagor who participates in the fraud of an agent of the mortgagee in diverting proceeds of the mortgage loan from the promised payment of a prior mortgage may not hold the mortgagee responsible for the agent's fraud.[4]

Footnotes

[1] Moyer v. Norristown-Penn Trust Co., 296 Pa. 26, 145 A. 682 (1929).
Deeds of trust, generally, see §§ 109 to 121.

[2] Patterson v. Guardian Trust Co. of New York, 144 A.D. 863, 129 N.Y.S. 807 (3d Dep't 1911).

[3] Newhall v. Norristown Trust Co., 280 Pa. 195, 124 A. 337 (1924).

[4] Thirteenth Ward Bldg. & Loan Ass'n of Newark v. Weissberg, 115 N.J. Eq. 487, 170 A. 662, 98 A.L.R. 134 (Ct. Err. & App. 1934).

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54A Am. Jur. 2d Mortgages II C Refs.

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II. Requisites and Validity; Modification

C. Execution

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 740, 742 to 745

A.L.R. Library

A.L.R. Index, Mortgages
West's A.L.R. Digest, Mortgages and Deeds of Trust 740, 742 to 745

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II. Requisites and Validity; Modification

C. Execution

§ 18. Execution of mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 740

The execution of mortgages is generally a subject of statutory regulation.[1] If any one of the prerequisites for proper execution of a mortgage is not met, the mortgage is not validly executed.[2] However, compliance with the specific statutory form is not necessary to create a valid mortgage between the parties to the transaction.[3]

Footnotes

1 In re Green, 793 F.3d 463 (5th Cir. 2015) (under Louisiana law); In re Sandy Ridge Oil Co., Inc., 807 F.2d 1332 (7th Cir. 1986), certified question answered on other grounds, 510 N.E.2d 667 (Ind. 1987) (applying Indiana law); In re Sunnafrank, 456 B.R. 885 (Bankr. S.D. Ohio 2011) (under Ohio law); Pocatello R.R. Employees Federal Credit Union v. Galloway, 117 Idaho 739, 791 P.2d 1318 (Ct. App. 1990); Miller v. Diversified Loan Service Co., 181 W. Va. 320, 382 S.E.2d 514 (1989).

2 In re Zaptocky, 250 F.3d 1020, 2001 FED App. 0167P (6th Cir. 2001).

3 Wolf v. Schumacher, 477 N.W.2d 827 (N.D. 1991), holding that since there was a promissory note and other evidence that the transaction was intended as a mortgage, it could be enforced as such between the parties.

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II. Requisites and Validity; Modification

C. Execution

§ 19. Signatures on mortgage; forgeries

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 742, 743

A major prerequisite for the proper execution of a mortgage is that the mortgagor must sign the mortgage deed.[1] The absence of such signature is not cured by a subsequent acknowledgment of the mortgage,[2] but the signature does not necessarily need to appear at a particular place in the document.[3]

Observation:

Absent proof that a mortgage is contingent upon the happening of a future event, a signed mortgage is an executed contract.[4]

Under some authority, as long as mortgagor's signature is legible, the mortgagor's name need not appear elsewhere in the writing in order for the mortgage to be valid for recording purposes.[5]

The mere fact that a spouse does not join with the other spouse in signing a mortgage note does not mean that his or her interest in real property which they jointly own is not subject to the mortgage lien, where he or she clearly cosigns the mortgage, initials each page of the mortgage document, and signs on a line labeled "borrower" rather than on either of the marked "witness" lines.[6] However, mortgages on homestead property signed by one spouse but not the other during their marriage are invalid, where both spouses are required by statute to sign any transaction mortgaging a homestead.[7]

Execution of a mortgage by a daughter-in-law is not subject to ratification to cure the failure of parents to sign a mortgage, as required to bind the parents, absent any evidence that the daughter-in-law, or anyone else, informed the parents of all the

material facts related to the loan and mortgage.[8]

A forged mortgage is void, a legal nullity,[9] so that a forged mortgage does not grant any interests to the holder.[10] However, a mortgagor may be deemed to have adopted any unauthorized signature based on the mortgagor's conduct in retaining the benefits of the transaction, i.e., the mortgage proceeds, and making payments on the note for more than one year.[11]

Observation:

A deed of trust is not rendered invalid on the ground that the lender's agent did not sign it during the loan origination process, where the statutes governing conveyances of interests in land and deeds of trust do not indicate that a deed of trust has to be signed by a lender to be valid.[12]

Footnotes

1 In re Zaptocky, 250 F.3d 1020, 2001 FED App. 0167P (6th Cir. 2001).

2 American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 P. 837 (1911), on reh'g, 67 Wash. 572, 122 P. 26 (1912).
Acknowledgment, generally, see § 20.

3 United Mississippi Bank v. GMAC Mortg. Co., 615 So. 2d 1174 (Miss. 1993) (party's signature on two attachments to the deed of trust sufficient).

4 Mitchell Bank v. Schanke, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004).

5 In re Perry, 600 B.R. 584 (B.A.P. 6th Cir. 2019) (under Ohio law).

6 In re Mulkanoor, 595 B.R. 795 (Bankr. N.D. Ill. 2018) (under Illinois law).

7 U.S. Bank National Association v. Stehno, 2017 WI App 57, 378 Wis. 2d 179, 902 N.W.2d 270 (Ct. App. 2017).

8 Wells Fargo Bank, N.A. v. Clavero, 201 So. 3d 72 (Fla. 3d DCA 2015).

9 Jamnadas v. Singh, 731 So. 2d 69 (Fla. 5th DCA 1999).
A finding that there was no valid debt, in a bank's action for foreclosure under a power of sale, was supported by evidence that the signatures of the putative mortgagors were forged. Espinosa v. Martin, 135 N.C. App. 305, 520 S.E.2d 108 (1999).
A trial court's finding in a foreclosure action that the signature of a wife on a mortgage was a forgery was supported by the wife's testimony denying that she signed the mortgage and a notary public's admission that the wife did not sign the mortgage in his presence. Triad Distributors, Inc. v. Conde, 56 A.D.2d 648, 391 N.Y.S.2d 897 (2d Dep't 1977).
Acts constituting fraud, generally, see § 27.

10 In re Sutter, 665 F.3d 722 (6th Cir. 2012) (under Michigan law).

11 PNC Bank, Nat. Ass'n v. Krier, 2015 IL App (3d) 140639, 395 Ill. Dec. 449, 38 N.E.3d 635 (App. Ct. 3d Dist. 2015); BAC Home Loans Servicing, LP v. Uvino, 155 A.D.3d 1155, 64 N.Y.S.3d 377, 94 U.C.C. Rep. Serv. 2d 62 (3d Dep't 2017).

12 Hooks v. Alaska USA Federal Credit Union, 413 P.3d 1192 (Alaska 2018).

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II. Requisites and Validity; Modification

C. Execution

§ 20. Acknowledgment of mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 745

Statutes have been enacted in many jurisdictions requiring the acknowledgment of mortgages.[1]

Definition:

An "acknowledgment" is the formal statement of the person signing the document that his or her signature was freely done.[2]

Under such statutes, however, it has been held that an acknowledgment is not necessary to the operation of the mortgage as between the parties,[3] although sometimes a different rule obtains by statute with respect to particular mortgages.[4]

State law may specifically forgive defective acknowledgments, that in either substance or intent comply with the requirement,[5] and there is even authority that in the absence of fraud, a defect resulting from the failure to include a notarized acknowledgment of a signature on a mortgage does not render the terms of the mortgage unenforceable as between the parties.[6]

Even an improperly notarized deed of trust can give constructive notice of its existence.[7] and be considered valid.[8] In addition, the fact that the trustee named in the deed of trust was the same person who had taken the mortgagor's acknowledgment does not render the deed of trust void or voidable where the trustee would not have benefited in any way if the deed of trust was foreclosed or if the note was timely paid in full.[9]

A mortgage given by a married person for the purchase money of land, delivered at the same time of the purchase, is not invalid because it was not executed and acknowledged by the person's spouse.[10]

Footnotes

1 Schwab v. GMAC Mortg. Corp., 333 F.3d 135 (3d Cir. 2003); In re Biggs, 377 F.3d 515, 2004 FED App. 0250P (6th Cir. 2004) (deed of trust under Tennessee law); Citizens Nat. Bank in Zanesville v. Denison, 165 Ohio St. 89, 59 Ohio Op. 96, 133 N.E.2d 329, 59 A.L.R.2d 1293 (1956); Read v. Toledo Loan Co., 68 Ohio St. 280, 67 N.E. 729 (1903); Simpson v. Hillis, 1911 OK 431, 30 Okla. 561, 120 P. 572 (1911).
Defective acknowledgment of a mortgage that was recorded did not provide a bona fide purchaser with constructive notice of mortgage, and thus the mortgage was voidable by a bankruptcy trustee in the mortgagors' Chapter 7 case, even if the trustee had actual notice of the mortgage. In re Vance, 99 Fed. Appx. 25 (6th Cir. 2004).

2 In re Biggs, 377 F.3d 515, 2004 FED App. 0250P (6th Cir. 2004) (deed of trust under Tennessee law).
Signature, generally, see § 19.

3 Rogers v. Great American Federal Sav. and Loan Ass'n, 304 Ark. 143, 801 S.W.2d 36 (1990); Associates Financial Services Co. of Mississippi, Inc. v. Bennett, 611 So. 2d 973 (Miss. 1992); Skagit State Bank v. Rasmussen, 109 Wash. 2d 377, 745 P.2d 37 (1987).
Even if the acknowledgment of guarantors' signatures were proven to be defective, the mortgage would still have been effective between the bank and the debtor, whose indebtedness on a cognovit note was guaranteed. Natl. City Bank v. Facilities Asset Mgt., Inc., 145 Ohio App. 3d 340, 762 N.E.2d 1060 (8th Dist. Cuyahoga County 2001).

4 Le Mesnager v. Hamilton, 101 Cal. 532, 35 P. 1054 (1894); American Savings & Loan Ass'n v. Burghardt, 19 Mont. 323, 48 P. 391 (1897); Havemeyer v. Dahn, 48 Neb. 536, 67 N.W. 489 (1896); Abraham v. Fioramonte, 158 Ohio St. 213, 48 Ohio Op. 159, 107 N.E.2d 321, 33 A.L.R.2d 1267 (1952).

5 In re Biggs, 377 F.3d 515, 2004 FED App. 0250P (6th Cir. 2004) (deed of trust).

6 Central Mortgage Company v. Seye, 2017-Ohio-8713, 100 N.E.3d 969 (Ohio Ct. App. 10th Dist. Franklin County 2017).

7 In re Casbeer, 793 F.2d 1436 (5th Cir. 1986), in which the deed of trust was signed and recorded, but improperly acknowledged since an employee of the mortgagee notarized it after the mortgagor signed and sent it in.
Deeds of trust, generally, see §§ 109 to 121.

8 Mullaney v. Bank of America, National Association, 611 B.R. 770 (E.D. N.C. 2019), appeal dismissed, 2020 WL 3250031 (4th Cir. 2020); Mitchell v. Church, 2008 WL 4409461 (Del. Super. Ct. 2008) (no statute required notarization of the mortgagor's signature, and nothing invalidated a mortgage that did not follow the statutory form; the notarial acts law did not require that the mortgagor's acknowledgment had to be notarized in order to make the mortgage valid and the record which included mortgagor's testimony, his signature, and appearance satisfied the court that mortgagor had knowingly signed the mortgage).

9 Denson v. First Bank & Trust of Cleveland, 728 S.W.2d 876 (Tex. App. Beaumont 1987).

10 Mutual of Omaha Bank v. Watson, 297 Neb. 479, 900 N.W.2d 545 (2017).

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II. Requisites and Validity; Modification

C. Execution

§ 21. Attestation of mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 745

In some jurisdictions it is provided by statute that mortgages must be attested by witnesses, two witnesses being the number usually required.[1] An insufficiently attested mortgage will generally not give a subsequent purchaser notice of the mortgage[2] but it is valid as between the parties.[3]

Footnotes

1 In re Zaptocky, 250 F.3d 1020, 2001 FED App. 0167P (6th Cir. 2001); Ross v. Richter, 187 So. 2d 653 (Fla. 2d DCA 1966) (homestead property); Pringle v. Dunn, 37 Wis. 449, 1875 WL 3528 (1875).
Signature, generally, see § 19.

2 In re Ryan, 851 F.2d 502 (1st Cir. 1988), holding that an improperly witnessed mortgage will not be construed to give a bankruptcy trustee (deemed to have the rights of a subsequent bona fide purchaser) either constructive or inquiry notice, thus giving the bankruptcy trustee priority over the mortgagee.

3 Merchants Bank v. Bouchard, 153 Vt. 6, 568 A.2d 412 (1989), holding that a grantor is estopped to assert title against a grantee because of improper attestation of the grant instrument.
A mortgage was valid and enforceable, even if only one of the two attesting witnesses was actually present when the mortgagors signed it, since the mortgagors' signatures were not obtained by fraud. Texas Commerce Bank Nat. Ass'n v. Joseph, 2003-Ohio-995, 2003 WL 757015 (Ohio Ct. App. 8th Dist. Cuyahoga County 2003).

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II. Requisites and Validity; Modification

C. Execution

§ 22. Seal as essential to acknowledgement of mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 744

A seal has been regarded as an essential part of a mortgage[1] and the failure to affix a notary seal to an acknowledgment renders the acknowledgment invalid, even when the parties do not dispute the notary's authority, and even though the acts of a notary public are presumed to be performed correctly.[2] A notary seal is either affixed or not affixed to the acknowledgement, and thus, the requirement that a notary seal be affixed in order for proper acknowledgement required for the deed to be legally registered is not subject to substantial-compliance analysis.[3] However, a mortgage lien is valid despite the fact that the notary public's embossed seal is not visible in the acknowledgment on the document presented for filing with the county recorder of deeds.[4] Moreover, an instrument incapable of having in law the effect of a mortgage because of the absence of a seal may be treated as a mortgage in equity.[5]

Footnotes

1 Collins v. Collins, 51 Miss. 311, 1875 WL 6543 (1875).

2 In re Biggs, 377 F.3d 515, 2004 FED App. 0250P (6th Cir. 2004) (applying Tennessee law) (deed of trust).

3 In re Marsh, 12 S.W.3d 449 (Tenn. 2000) (deed of trust).

4 Schwab v. GMAC Mortg. Corp., 333 F.3d 135 (3d Cir. 2003) (applying Pennsylvania law; it was obvious that the legislature considered the recording of a deed or mortgage to be adequate notice to the public when the acknowledgment includes only the rubber stamp seal that is visible on the copy of the document).

5 Handler Const., Inc. v. CoreStates Bank, N.A., 633 A.2d 356 (Del. 1993).
Equitable mortgages, generally, see § 74.

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II. Requisites and Validity; Modification

D. Delivery and Acceptance

Topic Summary | Correlation Table

Research References

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West's Key Number Digest, Mortgages and Deeds of Trust 757 to 761

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II. Requisites and Validity; Modification

D. Delivery and Acceptance

§ 23. Delivery and acceptance of mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 757 to 761

Where a mortgage is signed by the mortgagor, delivered to and accepted by the mortgagee, or its agent, the mortgage constitutes a valid contract and security or lien.[1] Thus, an indispensable requisite to the operation of a mortgage[2] or deed of trust, is delivery.[3] and not only must there be delivery, but there must also be acceptance; until accepted, it can have no effect.[4]

Observation:

Mere acceptance of a mortgage gives rise to an implication of assent to its terms, even if the mortgagee is ignorant of its contents.[5]

A grantee's knowledge of the existence of a deed of trust does not accomplish delivery.[6]

Footnotes

1 Deutsche Bank Nat. Trust Co. v. Pietranico, 33 Misc. 3d 528, 928 N.Y.S.2d 818 (Sup 2011), order aff'd, 102 A.D.3d 724, 957 N.Y.S.2d 868 (2d Dep't 2013).

2 Bell v. Farmers' Bank of Kentucky, 74 Ky. 34, 11 Bush 34, 1875 WL 11452 (1875); Collins v. Collins, 51 Miss. 311,

1875 WL 6543 (1875); Shirley v. Burch, 16 Or. 83, 18 P. 351 (1888).

[3] Defendant A v. Idaho State Bar, 132 Idaho 662, 978 P.2d 222 (1999).
Deeds of trust, generally, see §§ 109 to 121.

[4] Woodbury v. Fisher, 20 Ind. 387, 1863 WL 2125 (1863); Lee v. Fletcher, 46 Minn. 49, 48 N.W. 456 (1891); Shirley v. Burch, 16 Or. 83, 18 P. 351 (1888); Tittle v. Vanleer, 89 Tex. 174, 29 S.W. 1065 (1895).

[5] Wranovics v. Finnerty, 277 A.D.2d 841, 716 N.Y.S.2d 799 (3d Dep't 2000).

[6] Defendant A v. Idaho State Bar, 132 Idaho 662, 978 P.2d 222 (1999).

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54A Am. Jur. 2d Mortgages § 24

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II. Requisites and Validity; Modification

D. Delivery and Acceptance

§ 24. Delivery of mortgage by less than all mortgagors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 757

The delivery of a mortgage by one joint mortgagor does not constitute a valid delivery as to his or her comortgagors.[1] The delivery of a mortgage, however, by one or more, but not all, joint mortgagors constitutes a valid delivery as to them.[2]

Footnotes

1 Creighton v. Elgin, 387 Ill. 592, 56 N.E.2d 825, 162 A.L.R. 883 (1944) (deed); Meador v. Ward, 303 Mo. 176, 260 S.W. 106 (1924) (deed); Meikle v. Cloquet, 44 Wash. 513, 87 P. 841 (1906).

2 Creighton v. Elgin, 387 Ill. 592, 56 N.E.2d 825, 162 A.L.R. 883 (1944) (deed); Thompson v. Flint & P.M.R. Co., 131 Mich. 95, 90 N.W. 1037 (1902) (deed); Dickson v. Maddox, 330 Mo. 51, 48 S.W.2d 873 (1932) (deed).

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II. Requisites and Validity; Modification

D. Delivery and Acceptance

§ 25. Determination of whether mortgage delivered

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 757 to 761

Whether delivery of a mortgage has been made is a question of fact which may be inferred from the circumstances.[1] Acceptance by a trustee under a deed of trust is presumed from delivery to him or her.[2]

Footnotes

1 Massachusetts Trust Co. v. Loon Lake Copper Co., 4 F.2d 847 (C.C.A. 9th Cir. 1925); Bradtfeldt v. Cooke, 27 Or. 194, 40 P. 1 (1895).

2 Massachusetts Trust Co. v. Loon Lake Copper Co., 4 F.2d 847 (C.C.A. 9th Cir. 1925); Bowden v. Parrish, 86 Va. 67, 9 S.E. 616 (1889).
Deeds of trust, generally, see §§ 109 to 121.

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54A Am. Jur. 2d Mortgages II E Refs.

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II. Requisites and Validity; Modification

E. Effect of Fraud, Undue Influence, or Duress

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 780 to 782

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II. Requisites and Validity; Modification

E. Effect of Fraud, Undue Influence, or Duress

§ 26. Fraud, undue influence, or duress affecting validity of mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 780 to 782

Trial Strategy

Exercise of Undue Control by a Lender Over a Borrower, 15 Am. Jur. Proof of Facts 3d 695

A mortgage, like any other contract, may be avoided or held subject to defense where it is procured by fraud[1] or false pretenses,[2] or duress.[3]

Practice Tip:

A mortgagee's fraud or misrepresentation may give a mortgagor a right to rescind the mortgage, irrespective of the mortgagor's rescission rights under the Federal Truth In Lending Act or the State Uniform Consumer Credit Code.[4]

While fraud in the inducement of a senior mortgage may in certain cases be asserted by a junior lienor as an affirmative defense to a foreclosure action, fraud in inducing a junior lien is no defense to an action to foreclose a senior mortgage in the inducement of which no fraud is alleged.[5]

A mortgage entered into under extreme duress may render the mortgage void; less extreme duress may render the mortgage voidable at the option of the mortgagor.[6]

Absent specific facts tending to show that a bank officer was in a confidential relationship with an individual who guarantees a third party's commercial loan and secures the guarantee with a mortgage, no common-law presumption of undue influence may arise.[7]

Footnotes

1 In re Settlers' Housing Service, Inc., 568 B.R. 40 (Bankr. N.D. Ill. 2017); Derrick v. Sams, 98 Ga. 397, 25 S.E. 509 (1896); Green v. Wilkie, 98 Iowa 74, 66 N.W. 1046 (1896); Hunter v. Chase, 144 Md. 13, 123 A. 393 (1923); Lomerson v. Johnston, 47 N.J. Eq. 312, 20 A. 675 (Ct. Err. & App. 1890).
A spouse's fraud in inducing a spouse to execute a mortgage does not invalidate it as against the mortgagee unless the mortgagee in some way participated in or knew of the fraud. Chase Manhattan Mortg. Corp. v. Machado, 83 Conn. App. 183, 850 A.2d 260 (2004).
Acts constituting fraud, see § 27.

2 Ortiz v. Silver Investors, 165 A.D.3d 1156, 87 N.Y.S.3d 50 (2d Dep't 2018).

3 Coppoc v. Moeller, 69 Ark. App. 392, 13 S.W.3d 596 (2000); Berry v. Berry, 57 Kan. 691, 47 P. 837 (1897); Harris v. Carmody, 131 Mass. 51, 1881 WL 11240 (1881); Hogan v. Leeper, 1913 OK 428, 37 Okla. 655, 133 P. 190 (1913) (deed of trust); Mack v. Prang, 104 Wis. 1, 79 N.W. 770 (1899).
Acts constituting duress, see § 28.
Effect of unconscionable circumstances, see § 13.

4 Green Tree Acceptance, Inc. v. Anderson, 1999 OK CIV APP 46, 981 P.2d 804 (Div. 1 1999).

5 Inwood Park Developers, Inc. v. Erhal Holding Corp., 79 A.D.2d 648, 434 N.Y.S.2d 35 (2d Dep't 1980).

6 United Companies Financial Corp. v. Wyers, 518 So. 2d 700 (Ala. 1987).
To be voidable because of duress, a mortgage must not be obtained only by means of pressure, but it also must be unjust, unconscionable, or illegal. Bock v. Bank of Bellevue, 230 Neb. 908, 434 N.W.2d 310 (1989).

7 KeyBank Nat. Ass'n v. Sargent, 2000 ME 153, 758 A.2d 528 (Me. 2000).

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54A Am. Jur. 2d Mortgages § 27

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II. Requisites and Validity; Modification

E. Effect of Fraud, Undue Influence, or Duress

§ 27. Acts constituting fraud affecting mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 780

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Proof of Fraud by Former Spouse in Connection with Origination of Mortgage, 52 A.L.R.7th Art. 5

Three types of fraud have been recognized in the mortgage context: fraud in the factum, fraud in the inducement, and constructive fraud.[1]

"Fraud in the factum" procures a party's signature to an instrument without his or her knowledge of its true nature or contents.[2] However, fraud cannot be predicated upon misrepresentations as to the legal effect of a mortgage and note secured thereby.[3] In this connection, a mortgagor has been denied the right to set up as a defense to a mortgage that he or she signed the mortgage in ignorance of its contents.[4]

In the mortgage context, fraud in the inducement is fraud which induces the transaction by misrepresentation of motivating factors.[5] There can be no fraud in the inducement in the absence of reasonable reliance by the mortgagor,[6] and a claim against a lender for fraud in the inducement may be barred by the doctrine of caveat emptor.[7]

Constructive fraud in the mortgage context is characterized by the breach of a fiduciary or confidential relationship.[8] There can be no constructive fraud in the absence of reasonable reliance by the mortgagor.[9]

In order to establish a fraud claim based upon fraudulent concealment there must be evidence of a present intent to deceive by suppression or active concealment of a material fact, and the suppression of the material fact must have led the mortgagor to rely on the fact to the mortgagor's detriment.[10] It has been held that a lender's alleged failure to disclose to deed of trust

borrowers material facts known only to it is not actionable fraud where a fiduciary relationship did not exist between the borrowers and the lender.[11]

The unauthorized alteration of the documents by the mortgagee constitutes fraud on the basis of overreaching by the mortgagee in a bad faith effort to gain an unfair advantage.[12]

Footnotes

1 Aames Funding Corp. v. Mores, 107 Haw. 95, 110 P.3d 1042 (2005).

2 Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001).

3 Skagit State Bank v. Rasmussen, 109 Wash. 2d 377, 745 P.2d 37 (1987), holding that a mortgagor could not avoid the mortgage on the basis of a mistaken explanation of the legal effect of the documents.

4 Skagit State Bank v. Rasmussen, 109 Wash. 2d 377, 745 P.2d 37 (1987).
A deed of trust that a property owner signed to secure his grandson's loan from a bank was not rendered invalid on the basis of fraud or misrepresentation, even if the property owner claimed that he did not read the deed of trust, absent any duty on the part of the bank to advise the property owner, or make disclosures, with regard to the deed of trust. Ballard v. Commercial Bank of DeKalb, 991 So. 2d 1201 (Miss. 2008).

5 Aames Funding Corp. v. Mores, 107 Haw. 95, 110 P.3d 1042 (2005).
An adjustable rate mortgage was not fraudulently induced particularly in light of the clear and unambiguous terms of the mortgage documents, and the fact that the mortgagor initialed a rider confirming that the mortgage was an adjustable rate mortgage. Sander v. J.P. Morgan Chase Home Mortg., 56 A.D.3d 301, 867 N.Y.S.2d 87 (1st Dep't 2008).

6 Sweely Holdings, LLC v. SunTrust Bank, 296 Va. 367, 820 S.E.2d 596 (2018) (appraisal reports).

7 Potente v. Citibank, N.A., 282 F. Supp. 3d 538 (E.D. N.Y. 2017) (under New York law).

8 Aames Funding Corp. v. Mores, 107 Haw. 95, 110 P.3d 1042 (2005).

9 Sweely Holdings, LLC v. SunTrust Bank, 296 Va. 367, 820 S.E.2d 596 (2018) (appraisal reports).

10 Williams v. Citizens Nat. Bank of Shawmut, 570 So. 2d 635 (Ala. 1990).

11 Kimball v. Flagstar Bank F.S.B., 881 F. Supp. 2d 1209 (S.D. Cal. 2012) (under California law).

12 Doyle v. Trinity Sav. and Loan Ass'n, 869 F.2d 558, 8 U.C.C. Rep. Serv. 2d 728 (10th Cir. 1989), on reh'g in part, 940 F.2d 592, 15 U.C.C. Rep. Serv. 2d 176 (10th Cir. 1991).
A finding that the assignee of an adjustable interest promissory note made a material and fraudulent alteration, such as would warrant discharge of the associated mortgage debt, was supported by evidence that the change of the rate adjustment date injured the debtors, that the change was made after the assignee had received physical possession of the note, that the debtors' initials next to the change had been forged, and the lack of evidence that the change was a mere mistake. Maddox v. Summit Mortg. Corp., Nationsbanc Mortg. Corp., 2001 WL 1805883 (Tex. App. Beaumont 2002).
Forgery of a signature, generally, see § 19.

54A Am. Jur. 2d Mortgages § 28

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II. Requisites and Validity; Modification

E. Effect of Fraud, Undue Influence, or Duress

§ 28. Acts constituting duress affecting mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 781

Generally, duress involves improper pressure by another party that overcomes the will of the mortgagor and coerces the mortgagor to comply with demands to which the mortgagor would not yield if acting as a free agent,[1] by leaving the mortgagor without any reasonable alternatives than to acquiesce.[2]

Borrowers do not establish the defense of duress in relation to the execution of a loan agreement, promissory note, and security agreement, based on a purported threat by the lender that the lender would call the loan due if borrowers did not renew as it is in fact the lender's legal right, and it is therefore not cognizable as duress as a matter of law.[3] The same result has been reached in regard to threats of a lawful arrest for an offense which has actually been committed, where the mortgage was made to secure the maker of the threats for the loss occasioned to him by the commission of such crime;[4] but in regard to threats of arrest or prosecution, the question of the existence of duress in the execution of a mortgage has been held to depend not so much upon the means by which the mortgagor was compelled to execute the mortgage as upon the state of mind produced by the means employed.[5]

Footnotes

[1] United Companies Financial Corp. v. Wyers, 518 So. 2d 700 (Ala. 1987).
Mortgagor, a limited liability company and its sole member, failed to establish the special defense of duress in a foreclosure action, even though the member testified that she did not like the deal and even though the member's son opined that his mother had no choice; the mortgagor and its sole member did not identify any wrongful act or threat by the mortgagee's trustee and the member did not testify that she felt any fear or threat at the closing or that her free will was overborne. Tedesco v. Agolli, 182 Conn. App. 291, 189 A.3d 672 (2018), certification denied, 330 Conn. 905, 192 A.3d 427 (2018).
A mortgage was not void, despite a claim that the mortgagor signed it under duress, where nothing indicated that the mortgagor's husband overpowered her and manually manipulated her hand to appear to assent, and there was no threat

of imminent physical violence upon the mortgagor such that she reasonably feared loss of life or serious physical injury at time she signed the document, which was the day following an incident during which the husband removed a pair of scissors from a knife drawer and waved them back and forth after he found out that the mortgagor had routinely thwarted his attempts to secure a loan. EverBank v. Marini, 200 Vt. 490, 2015 VT 131, 134 A.3d 189 (2015).

[2] Holmes v. Runyan & Assoc., Inc., 2009 WL 5063305 (S.D. W. Va. 2009).

[3] Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504 (Colo. App. 2006).

[4] Smith v. Commercial Bank of Jasper, 77 Fla. 163, 81 So. 154, 4 A.L.R. 862 (1919).

[5] Williamson-Halsell, Frazier Co. v. Ackerman, 77 Kan. 502, 94 P. 807 (1908), holding that if threats of arrest and prosecution of a son operate to deprive the father of his free will power and to constrain the execution of the mortgage, the actual guilt or innocence of the son upon the charge of embezzlement was not a material question in determining whether there was duress.

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54A Am. Jur. 2d Mortgages II F Refs.

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 820

West's Key Number Digest, Mortgages and Deeds of Trust 754, 941 to 945, 947, 948, 950 to 952, 1091 to 1100

A.L.R. Library

A.L.R. Index, Mortgages
West's A.L.R. Digest, Landlord and Tenant 820
West's A.L.R. Digest, Mortgages and Deeds of Trust 754, 941 to 945, 947, 948, 950 to 952, 1091 to 1100

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54A Am. Jur. 2d Mortgages § 29

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

1. In General

§ 29. Property and interests subject to mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 941 to 945

Forms

Am. Jur. Legal Forms 2d § 179:332 (Property encumbered—Personal property)

The general rule is that it is essential to the existence of a mortgage which purports to cover present interests of the mortgagor that the mortgagor hold, or by the transaction acquire, some estate or interest capable of being mortgaged.[1] A mortgage covers no rights or interests other than those which the mortgagor has or subsequently acquires.[2]

As a rule, anything or any interest capable of passing by purchase or descent is capable of being encumbered by mortgage.[3] Nothing prevents one of the co-owners from mortgaging his or her own interest in a tenancy; to the contrary, each tenant may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other.[4] Additionally, an interest capable of being mortgaged may be said to exist not only in the obvious case when the mortgagor has vested rights of ownership in the property sought to be mortgaged, but also when he or she has an enforceable right, arising from contract or operation of law, to acquire such rights of ownership therein.[5]

The question as to what personalty will fall within the provisions of a mortgage covering personal property on, attached to, or used in connection with, the real estate involved, is one of intent as disclosed by the instrument in question.[6]

Under some authority, a person executing mortgage must be the registered title owner or have pending for recordation his or her title to the property which is to be encumbered by the mortgage.[7]

Footnotes

[1] Pennock v. Coe, 64 U.S. 117, 23 How. 117, 16 L. Ed. 436, 1859 WL 10652 (1859); In re Snow, 199 Fed. Appx. 609 (9th Cir. 2006) (a deed of trust, executed by the bankruptcy debtor's son, was void and unenforceable against the proceeds of the bankruptcy estate's sale of the property, where the debtor, and not her son, owned the property on the date the son executed the deed of trust); GMAC Mortg. Corp. v. PWI Group, 155 P.3d 556 (Colo. App. 2006) (only the owner of real property can encumber or convey the same); Houston v. Forman, 92 Fla. 1, 109 So. 297, 48 A.L.R. 401 (1926); In re Bennett, 115 Minn. 342, 132 N.W. 309 (1911); Collins v. Collins, 51 Miss. 311, 1875 WL 6543 (1875).
The purpose of a statute which requires an attorney for the lender in a purchase-money first mortgage to certify that the mortgagor and mortgagee hold good and sufficient record title and that such certification must include a title examination dating back at least 50 years from the date of the conveyance is to ensure that the granting of a mortgage has vested title in the mortgagee to the land placed as security for the underlying debt. Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 946 N.E.2d 665 (2011).

[2] Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 U.S. 436, 13 S. Ct. 944, 37 L. Ed. 799 (1893); Wright v. Kentucky & G.E. Ry. Co., 117 U.S. 72, 6 S. Ct. 697, 29 L. Ed. 821 (1886); Occidental Life Ins. Co. v. May, 194 Wash. 201, 77 P.2d 773 (1938).

[3] In re Bennett, 115 Minn. 342, 132 N.W. 309 (1911); Tuttle v. Blow, 176 Mo. 158, 75 S.W. 617 (1903).
A mobile home, originally considered a motor vehicle, was considered to be improvements on real estate for purposes of perfecting a security interest therein after the home was permanently attached to the real estate (including substantial foundation, improvements around the home), the lender appraised the home and land as a unit in connection with a financing of both, and the owner acquired title to both (creating unity of title). In re Washington, 837 F.2d 455 (11th Cir. 1988).

[4] CitiFinancial Co. (DE) v. McKinney, 27 A.D.3d 224, 811 N.Y.S.2d 359 (1st Dep't 2006).

[5] Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917 (1932); Marion Mortg. Co. v. Grennan, 106 Fla. 913, 143 So. 761, 87 A.L.R. 1492 (1932); Simonson v. Wenzel, 27 N.D. 638, 147 N.W. 804 (1914).
Right to mortgage an option to purchase, see § 32.

[6] In re Porto Rico Iron Works, Inc., 835 F.2d 385 (1st Cir. 1987); White v. Murtha, 343 F.2d 831 (5th Cir. 1965) (holding that the terms "fixtures" and "appliances" in a hotel mortgage did not include furniture and furnishings not clearly affixed to the real estate); Farm Credit Bank of St. Paul v. Martinson, 453 N.W.2d 816 (N.D. 1990) (holding that grain bins erected by the agricultural tenant prior to the recordation of the mortgage were subject to the mortgage since the tenant did not preserve his right to remove the bins by recording a notice stating his intention to do so).
Liquors, beverages, and tobaccos could be considered as realty for the purpose of foreclosure of a mortgage, where, in the deed and mortgage, liquors, and tobaccos were stated to belong to the realty. Hill v. Salmon, 69 Wyo. 1, 236 P.2d 518 (1951).
Construction and interpretation of mortgage, generally, see §§ 7 to 9.

[7] In re Ramos, 493 B.R. 355 (Bankr. D. P.R. 2013) (under Puerto Rico law).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

1. In General

§ 30. Improvements and accretions as subject to mortgage; substitute collateral

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 950 to 952

Forms

Am. Jur. Legal Forms 2d §§ 179:313, 179:314, 179:321 (Property encumbered—Improvements)

The general rule is that all improvements located on mortgaged realty are covered by the mortgage, and as long as such improvements remain intact and may be identified, the mortgagee, by proper action, may seize and execute on such improvements, wherever located,[1] and the mortgage may so provide.[2] Moreover, a mortgage of real estate attaches to the land, not only in the condition in which it existed at the time of the execution of the mortgage, but as changed and improved by substitutions, accretions, or labor expended on it while the mortgage is in existence,[3] except for improvements removed by the mortgagor with the consent of the mortgagee.[4] In this connection it has been declared that it would be a hazardous doctrine to hold that a mortgagee who stands by and sees the property owners care for and improve the security does so at the peril of having his or her lien displaced in favor of the cost of such care and improvement.[5]

Land which builds up on the oceanfront side of an oceanfront parcel becomes part of the original parcel, rather than a separate parcel, and, thus, is encumbered by mortgage that describes the property using the same language as the mortgagor's original deed to the parcel.[6]

A mortgagee cannot be forced to give up its mortgage for substitute collateral.[7]

Footnotes

1 Coen v. Gobert, 154 So. 2d 443 (La. Ct. App. 2d Cir. 1963).

2 In re Black Angus Holdings, LLC, 434 B.R. 612 (Bankr. D. Kan. 2010) (under Kansas law).

3 Miladin v. Istrate, 125 Ind. App. 46, 119 N.E.2d 12 (1954); Raht v. Attrill, 106 N.Y. 423, 13 N.E. 282 (1887).
The interest of the holder of a purchase-money security interest in a heat pump was subordinate to the interest of the mortgagee of the property where the heat pump had been installed, where the holder of the security interest had not executed a fixture filing, because (1) the heat pump was a fixture as (a) the pump was sufficiently annexed to the realty via wires and tubes; (b) the premises would suffer a lack of utility if the heat pump was removed, such that a replacement would have to be installed; and (c) the apparent intention of the property owner was that the heat pump should become part of the real property; and (2) under the relevant statute, in order to protect a purchase-money security interest in a fixture the interest holder must execute a fixture filing. Household Finance Corp. v. BancOhio, 62 Ohio App. 3d 691, 577 N.E.2d 405 (2d Dist. Montgomery County 1989).

4 Coen v. Gobert, 154 So. 2d 443 (La. Ct. App. 2d Cir. 1963), holding that a mortgage does not continue as to a house removed from the mortgaged land and reconstructed on other land with the consent of the mortgagee, particularly where a statute provides that a mortgage is extinguished by the extinction of the thing mortgaged or by the creditor's renouncing the mortgage, the court taking the view that in this case not only did the mortgagee renounce the mortgage by consenting to the removal of the house but there was also an extinction of the thing mortgaged within the statute.

5 Hotchkiss v. Makeel, 87 Ill. App. 623, 1899 WL 4933 (1st Dist. 1899), aff'd, 190 Ill. 311, 60 N.E. 524 (1901); Miladin v. Istrate, 125 Ind. App. 46, 119 N.E.2d 12 (1954) (quoting statement with approval).

6 Accardi v. Regions Bank, 201 So. 3d 743 (Fla. 4th DCA 2016).

7 Beach Community Bank v. Spellman, 206 So. 3d 843 (Fla. 1st DCA 2016).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

1. In General

§ 31. Property to be acquired as subject to mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 952

Forms

Am. Jur. Legal Forms 2d § 179:317 (Property encumbered—After-acquired property)

At common law, a mortgage of property to be acquired by the mortgagor in the future is absolutely void.[1] A different rule, however, prevails in equity, and it is recognized in many cases that a mortgage or deed of trust may cover property to be acquired in the future.[2] When a creditor executes a trust deed or mortgage to secure a loan before acquiring title to the relevant property, the trust deed or mortgage ordinarily attaches a lien to the property as soon as the creditor obtains that title.[3] The lien of the mortgage is extended to after-acquired property in such case on the theory that although ineffectual as a conveyance, the mortgage operates as an executory agreement attaching to the property when acquired.[4] Hence, the time of the attachment of the mortgage to the property is the time of the acquisition thereof by the mortgagor.[5]

Caution:

Under some authority, for a lien to be created in a mortgage on property not yet acquired and the lien to attach at the time it is acquired, the mortgage must contain an express provision to that effect.[6]

Footnotes

[1] Shooters Island Shipyard Co. v. Standard Shipbuilding Corp., 293 F. 706 (C.C.A. 3d Cir. 1923); Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 282, 63 S.E. 1045 (1909).

[2] Bear Lake & River Waterworks & Irrigation Co. v. Garland, 164 U.S. 1, 17 S. Ct. 7, 41 L. Ed. 327 (1896); Shooters Island Shipyard Co. v. Standard Shipbuilding Corp., 293 F. 706 (C.C.A. 3d Cir. 1923); In re Hard Rock Exploration, Inc., 580 B.R. 202 (Bankr. S.D. W. Va. 2017) (under West Virginia law); Diggs v. Fidelity & Deposit Co. of Md., 112 Md. 50, 75 A. 517 (1910); Laster v. First Huntsville Properties Co., 826 S.W.2d 125 (Tex. 1991).

[3] RNT Holdings, LLC v. United General Title Ins. Co., 230 Cal. App. 4th 1289, 179 Cal. Rptr. 3d 175 (2d Dist. 2014).

[4] Shooters Island Shipyard Co. v. Standard Shipbuilding Corp., 293 F. 706 (C.C.A. 3d Cir. 1923); Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 282, 63 S.E. 1045 (1909).

[5] Bear Lake & River Waterworks & Irrigation Co. v. Garland, 164 U.S. 1, 17 S. Ct. 7, 41 L. Ed. 327 (1896); United Lines Tel. Co. v. Boston Safe-Deposit & Trust Co., 147 U.S. 431, 13 S. Ct. 396, 37 L. Ed. 231 (1893); Lowe v. Reierson, 201 Minn. 280, 276 N.W. 224 (1937).

[6] Thoryk v. San Diego Gas & Electric Co., 225 Cal. App. 4th 386, 170 Cal. Rptr. 3d 309 (4th Dist. 2014).

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54A Am. Jur. 2d Mortgages § 32

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Mortgages

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

1. In General

§ 32. Option to purchase as subject to mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 820

West's Key Number Digest, Mortgages and Deeds of Trust 945

A.L.R. Library

Right of assignee or sublessee to enforce option contained in lease for purchase of property, 45 A.L.R.2d 1034

There is authority in support of the right to mortgage an option to purchase real estate.[1] This is true of an option contained in a lease.[2] Under this rule, it has been held that a mortgage of a lease covers an option of purchase therein contained, even though it may not specifically mention the option, where, by statute, a mortgage is declared to be a lien upon everything that would pass by a grant of the property.[3]

Where a mortgage does cover an option contained in the lease, and the lessee exercises the option, the mortgage attaches to the fee so acquired by the lessee;[4] but if only the leasehold interest is intended to be included in the mortgage, the subsequent acquisition of the title of the real estate acquired under an option in the lease does not become subject to the mortgage.[5]

Footnotes

[1] Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917 (1932).

[2] Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917 (1932), holding that the fact that a lease is not assignable without the consent of the lessor does not make an option to purchase therein a mere personal covenant, and so not a mortgageable interest.

[3] Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917 (1932).

[4] Chapman v. Great Western Gypsum Co., 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917 (1932).

[5] Vansant v. Hartman, 88 Wash. 636, 153 P. 1062 (1915).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

1. In General

§ 33. Interests of vendor and vendee as subject to mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 945

The courts regard as mortgageable interests both the interest of a vendor of land, while the contract for the sale remains executory and no deed has passed,[1] and the interest of a vendee under a contract to purchase.[2] Moreover, where the mortgage of a vendee in possession of land under a contract to purchase is foreclosed, the mortgagee thereof becomes vested with all the rights the vendee had under the purchase agreement.[3]

A mortgagor has no power to mortgage property that is sold to purchasers under escrow contracts, even though no title passes until the land is paid for under the contract.[4]

Footnotes

1 In re Blanchard, 819 F.3d 981, 89 U.C.C. Rep. Serv. 2d 512 (7th Cir. 2016) (under Wisconsin law); In re Blanchard, 520 B.R. 740 (Bankr. E.D. Wis. 2014), decision aff'd, 2015 WL 1840557 (E.D. Wis. 2015), aff'd, 819 F.3d 981, 89 U.C.C. Rep. Serv. 2d 512 (7th Cir. 2016); Marion Mortg. Co. v. Grennan, 106 Fla. 913, 143 So. 761, 87 A.L.R. 1492 (1932) (holding that the terms of the mortgage cannot restrict the rights of the purchaser under the executory contract); Faust Corporation v. Harris, 2020 OK CIV APP 20, 467 P.3d 710 (Div. 4 2019).

2 Harris v. McCann, 229 Ark. 972, 319 S.W.2d 832 (1959) (the purchaser had possession and had paid part of the purchase price); Gavin v. Johnson, 131 Conn. 489, 41 A.2d 113, 156 A.L.R. 1130 (1945) (vendee in possession); First Mortg. Corp. of Stuart v. deGive, 177 So. 2d 741 (Fla. 2d DCA 1965); Lewis v. Gray, 356 Mo. 115, 201 S.W.2d 148 (1947) (purchaser in possession and having partly performed his contract); Knauss v. Miles Homes, Inc., 173 N.W.2d 896 (N.D. 1969) (holding that the interest of a holder of a contract for a deed is a mortgageable interest); Simonson v. Wenzel, 27 N.D. 638, 147 N.W. 804 (1914).

[3] Gavin v. Johnson, 131 Conn. 489, 41 A.2d 113, 156 A.L.R. 1130 (1945).

[4] Hatchett v. Terry, 87 Ark. App. 276, 190 S.W.3d 302 (2004).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

1. In General

§ 34. Rents and profits as subject to mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 1091 to 1100

Forms

Am. Jur. Legal Forms 2d § 179:317 (Property encumbered—Assignment of rents and profits)

Under the lien theory of mortgages, the mortgagee is not the owner of the property and is not entitled to its possession, rentals, or profits.[1] However, a security interest in rents arising from real estate may be created in favor of the mortgagee.[2] Thus, the rents may be assigned by a provision in the mortgage.[3] Under some authority, a mortgage which includes an assignment of rents as additional security is not self-executing and operates merely as a pledge of the rents; it does not automatically entitle the mortgagee to the rents.[4]

Observation:

In some jurisdictions, real property is defined to include rents therefrom, and a mortgagee that takes a security interest in rents from a mortgaged property is not regarded as having an interest in property other than the realty itself.[5]

Sometimes it is expressly provided by statute that in the case of a deed of trust it shall be lawful to assign the rents and profits of the mortgaged property to the trustee for the benefit of holders of obligations issued under the deed of trust.[6] Such a statute has been upheld against attacks upon its constitutionality,[7] but it does not apply to trust mortgages executed prior to the enactment of the statute.[8] In a similar vein, a statute may expressly provide that a mortgagor and mortgagee are free to contract for an assignment of rents.[9]

An assignment of rents creates a lien on the rents in favor of the mortgagee, and the mortgagee will have the right to foreclose that lien and collect the rents, without the necessity of foreclosing on the underlying mortgage.[10]

Caution:

A statute providing that a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law has been held to invalidate a provision in the mortgage for taking possession and receiving the rents and profits.[11]

Footnotes

1 Cadle Co. v. Collin Creek Phase II Associates, Ltd., 998 S.W.2d 718 (Tex. App. Texarkana 1999).

2 24th & Dodge Ltd. Partnership v. Acceptance Ins. Co., 269 Neb. 31, 690 N.W.2d 769 (2005).

3 Smith v. Mutual Ben. Life Ins. Co., 362 Mich. 114, 106 N.W.2d 515 (1960).
A granting clause in the mortgage of leased property, in which the mortgagor agreed to sell and convey the property to the mortgagee, together with all rents, issues, and profits thereof until the debt secured was paid in full, created a primary security interest in the rent in favor of mortgagee when the mortgage was executed. Schoenfelder v. American General Life Ins. Co., 715 N.W.2d 767 (Iowa Ct. App. 2006).

4 Laura Andrew, Inc. v. DLRA Group, LLC, 62 Misc. 3d 615, 90 N.Y.S.3d 829 (Sup 2018).

5 In re Scarborough, 461 F.3d 406 (3d Cir. 2006).

6 Guaranty Trust Co. of Detroit v. Feldman, 247 Mich. 524, 226 N.W. 233 (1929).
Deeds of trust, generally, see §§ 109 to 121.

7 Guaranty Trust Co. of Detroit v. Feldman, 247 Mich. 524, 226 N.W. 233 (1929).

8 Detroit Trust Co. v. Lipsitz, 264 Mich. 404, 249 N.W. 892 (1933).

9 Green Emerald Homes, LLC v. Residential Credit Opportunities Trust, 256 So. 3d 211 (Fla. 2d DCA 2018).

10 Green Emerald Homes, LLC v. Residential Credit Opportunities Trust, 256 So. 3d 211 (Fla. 2d DCA 2018).

11 Teal v. Walker, 111 U.S. 242, 4 S. Ct. 420, 28 L. Ed. 415 (1884); Orr v. Bennett, 135 Minn. 443, 161 N.W. 165, 4 A.L.R. 1396 (1917) (referring to the rents and royalties due under a mining lease); Wolford v. Cook, 71 Minn. 77, 73 N.W. 706 (1898); State v. Superior Court for King County, 170 Wash. 463, 16 P.2d 831, 87 A.L.R. 620 (1932), opinion adhered to on reh'g, 170 Wash. 463, 19 P.2d 1119 (1933).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

a. In General

§ 35. Description of mortgaged property, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

Forms

Am. Jur. Legal Forms 2d §§ 179:309, 179:310 (Description of property encumbered)

To be enforceable, a trust deed must sufficiently describe the property securing it.[1] Generally, the rules as to descriptions of real estate in mortgages conform to those prevailing with respect to descriptions in deeds.[2] A statute may require that a mortgage include a description of land or interest in land and encumbrances, reservations, and exceptions, if any.[3] However, under some authority, if property is not expressly included in the instrument's description, it will not be covered by the mortgage.[4] In any event, an inaccurate description in a mortgage does not automatically serve to invalidate an instrument.[5] An inaccurate legal description in a collateral mortgage, may be corrected so as to make it accurately express the true intent and agreement of the parties[6] and a mortgage will not be invalidated by reason of an error in the description of the property, in case the remainder of the description, after rejecting the erroneous portion, is sufficiently definite to enable the land to be located.[7] Moreover, mortgages are frequently upheld against attacks based upon the indefiniteness of the mortgage.[8]

There is no bright-line rule for determining the sufficiency of a property description in a mortgage or deed.[9] However, any reference or description by which the premises intended to be dealt with may be found and identified is generally regarded as sufficient,[10] and a description will not be deemed insufficient if by any reasonable construction of its terms it can be held to inclose or embrace a particular tract of land.[11] The description need only be such that the land can be identified or located on the ground by use of the same.[12] Where the description of property used in a mortgage furnishes a key whereby a person,

aided by extrinsic evidence, can ascertain what property is covered, such description is sufficient.[13] Thus, a description may be sufficient even though it may be necessary, because of its imperfect or indefinite character, to aid the intention of the parties by averring and proving extrinsic facts.[14] Accordingly, in order to identify the property intended to be mortgaged, and to give effect to the intention of the parties to the instrument, parol evidence is generally held admissible to explain a mistake in description of property in a mortgage,[15] or to explain and remove an uncertainty.[16] If the description of the land is so vague and indefinite, however, that effect could not be given the instrument without writing new material language into it, parol evidence is not admissible.[17]

Footnotes

1 MTC Financial Inc. v. California Dept. of Tax & Fee Administration, 41 Cal. App. 5th 742, 254 Cal. Rptr. 3d 485 (4th Dist. 2019).

2 Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill. App. 554, 1922 WL 2429 (4th Dist. 1922); Pierce v. Adams, 137 Me. 281, 18 A.2d 792, 134 A.L.R. 1033 (1941) (holding that the property covered by a real estate mortgage must be determined by ascertaining the intention of the parties as expressed therein, in light of the circumstances existing at the time it was made).
Deed descriptions, generally, see Am. Jur. 2d, Deeds §§ 38 to 51.

3 In re Schlabach, 490 B.R. 555 (Bankr. S.D. Ohio 2012) (under Ohio law); Williams v. Schneider, 2018-Ohio-968, 109 N.E.3d 124 (Ohio Ct. App. 8th Dist. Cuyahoga County 2018), appeal not allowed, 153 Ohio St. 3d 1462, 2018-Ohio-3258, 104 N.E.3d 792 (2018).
Exceptions, see § 36.

4 Panetta v. Equity One, Inc., 190 N.J. 307, 920 A.2d 638 (2007).
A retainer agreement in which a law firm referred to the client's "share of the property division" in the divorce action as the property subject to an attorney charging lien did not give a sufficient description of the former marital residence to constitute a "mortgage" on the former marital residence. Sowder v. Sowder, 127 N.M. 114, 1999-NMCA-058, 977 P.2d 1034 (Ct. App. 1999).

5 Selby v. Roggow, 126 N.M. 766, 1999-NMCA-044, 975 P.2d 379 (Ct. App. 1999).

6 Cooper v. Southern Hunting Products, Ltd, 891 So. 2d 91 (La. Ct. App. 2d Cir. 2004).

7 Foster v. Taylor, 187 Ark. 172, 58 S.W.2d 675 (1933); Johnson v. McKay, 119 Ga. 196, 45 S.E. 992 (1903); Security Bldg. & Loan Ass'n v. Costello, 66 N.D. 179, 263 N.W. 712 (1935).
The failure of the mortgage to separately identify and describe the units of the condominium did not void the mortgage where it was clear that the parties intended to create a mortgage on the condominium property. FirstCentral Bank v. White, 400 N.W.2d 534 (Iowa 1987).

8 Poyzer v. Amenia Seed and Grain Co., 381 N.W.2d 192 (N.D. 1986); Jasper State Bank v. Goodrich, 107 S.W.2d 600 (Tex. Civ. App. Beaumont 1937), writ dismissed; Battle v. Wolfe, 283 S.W. 1073 (Tex. Civ. App. Amarillo 1926), writ refused, (Oct. 20, 1926).
A lack of degree symbols in the metes and bounds description for property, as attached to mortgage, did not prevent a loan servicing company from obtaining foreclosure of the mortgage, where the company proved the elements for foreclosure; the borrower never claimed, via affirmative defense or otherwise, that the typographical errors in the metes and bounds description rendered the mortgage ineffective to encumber property with a lien for the mortgage; the defense never suggested that omission of the degree symbols would prevent either party or a surveyor from locating the property affected by the lien; the correct lot and tract as well as street address were stated on both the note and the mortgage; and the mortgage listed the parcel identification number. Bayview Loan Servicing, LLC v. Newell, 231 So. 3d 588 (Fla. 1st DCA 2017).

9 In re LeBlanc, 604 B.R. 693 (E.D. La. 2019) (under Louisiana law).

10 Johnson v. McKay, 119 Ga. 196, 45 S.E. 992 (1903); Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill. App. 554, 1922 WL 2429 (4th Dist. 1922).
A property description on a senior deed of trust was legally sufficient to identify the property subject to the deed of

trust, in a quiet title action brought by a junior mortgagee against the subsequent owner and senior mortgagee, even though the property description on the deed of trust did not include the block number from the plat; the description included the lot number, the addition, the county, and the state, and the lot numbers for the addition were consecutive and did not repeat for each block. Guaranty Bank and Trust Co. v. LaSalle Nat. Bank Ass'n, 111 P.3d 521 (Colo. App. 2004).

[11] Payton v. McPhaul, 128 Ga. 510, 58 S.E. 50 (1907).
A mortgage of my "homestead farm" in a certain town is sufficiently definite to cover the whole farm without further description where its location and the land of which it is composed can be ascertained. Pierce v. Adams, 137 Me. 281, 18 A.2d 792, 134 A.L.R. 1033 (1941).

[12] MTC Financial Inc. v. California Dept. of Tax & Fee Administration, 41 Cal. App. 5th 742, 254 Cal. Rptr. 3d 485 (4th Dist. 2019).

[13] In re Ivy, 604 B.R. 540 (Bankr. W.D. Ark. 2019) (under Arkansas law).

[14] Johnson v. McKay, 119 Ga. 196, 45 S.E. 992 (1903); Derrick v. Sams, 98 Ga. 397, 25 S.E. 509 (1896); Bowen v. Wickersham, 124 Ind. 404, 24 N.E. 983 (1890).
The mortgagor failed to prove that a sufficient legal description of the property was not included with the mortgage instrument he executed, and thus, foreclosure by the mortgagee was properly permitted where the mortgagor ran a repair shop that went by the house number 308, but that address actually only referred to the front half of the building, as the building encompassed 308, 310, 312, and 314 as well; however, the mortgage and security agreement filed with the county recorder included an attachment with a complete legal description. Bayview Loan Servicing, LLC v. Reisetter, 755 N.W.2d 144 (Iowa Ct. App. 2008).

[15] Sharp v. Thompson, 100 Ill. 447, 1881 WL 10642 (1881); Hauseman Motor Co. v. Napierella, 223 Ky. 433, 3 S.W.2d 1084 (1928); American Nat. Bank v. John Van Range Co., 211 Ky. 849, 278 S.W. 133 (1925).

[16] Stancill v. Spain, 133 N.C. 76, 45 S.E. 466 (1903); Varner-Collins Hardware Co. v. New Milford Security Co., 1915 OK 822, 49 Okla. 613, 153 P. 667 (1915).
Ambiguities, generally, see §§ 38 to 41.

[17] Hauseman Motor Co. v. Napierella, 223 Ky. 433, 3 S.W.2d 1084 (1928); American Nat. Bank v. John Van Range Co., 211 Ky. 849, 278 S.W. 133 (1925).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

a. In General

§ 36. Uncertainty in description of area excepted from mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

A statute may require that a mortgage include a description of land or interest in land and encumbrances, reservations, and exceptions, if any.[1] The general rule is that uncertainty of or insufficiency in the description of an area of land which the mortgagor attempts to except from the operation of a mortgage affects only the validity of the exception and not the validity of the mortgage as a whole; accordingly the exception, if so uncertain as to be void, will be ignored and the mortgage will have the effect of conveying the entire tract described including the part sought to be excepted.[2]

Footnotes

1 § 35.

2 Morris v. Giddens, 101 Ala. 571, 14 So. 406 (1893); Ditman v. Clybourn, 4 Ill. App. 542, 1879 WL 8837 (1st Dist. 1879); Sherman v. Arnold's Neck Boat Club, 64 R.I. 485, 13 A.2d 272 (1940) (deed of trust).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

a. In General

§ 37. Instrument blank as to description of mortgaged property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 754

A.L.R. Library

Effect of supplying of description of property conveyed after manual delivery of deed or mortgage, 11 A.L.R.2d 1372

A mortgagor can deliver a deed, blank as to description, to the mortgagee, with authority to complete the description.[1]

Footnotes

[1] Security Bank v. Hawk, 35 Ohio St. 3d 1, 517 N.E.2d 886 (1988) (holding that when all parties agree to execute a mortgage contract partially in blank and one or both of the parties do in fact supply the missing information within a reasonable time, the mortgage is valid and enforceable by and between the parties or their assigns); American Nat. Bank of Wetumka v. Hightower, 1939 OK 31, 184 Okla. 294, 87 P.2d 311 (1939).

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54A Am. Jur. 2d Mortgages § 38

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

b. Ambiguities

§ 38. Ambiguities in description of mortgaged property, generally; latent and patent ambiguities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

Courts tend to allow a liberal interpretation of the description of the property and to uphold the validity of the mortgage if in any way it is possible to arrive at the intention of the parties thereto.[1] Ambiguities in the description of property in a mortgage of real estate are sometimes classified as either "latent" or "patent."[2] The general rule under this distinction is that a patent ambiguity in a mortgage may not be removed by parol evidence.[3]

A latent ambiguity in a mortgage may be explained and removed by parol evidence.[4] A typical instance of a latent ambiguity is a case where the description applies equally to each of two things.[5] A mortgage or trust deed which contains inconsistent descriptions of the property it encumbers is ambiguous[6] as a matter of law.[7]

Where a trust deed's legal description of the property is ambiguous and the grantee fails to provide any parol evidence for clarification, the deed's legal description of the property is insufficient to be enforceable.[8]

Footnotes

1 Stancill v. Spain, 133 N.C. 76, 45 S.E. 466 (1903); Varner-Collins Hardware Co. v. New Milford Security Co., 1915 OK 822, 49 Okla. 613, 153 P. 667 (1915).

2 Garrow v. Toxey, 188 Ala. 572, 66 So. 443 (1914); Craven v. Butterfield, 80 Ind. 503, 1881 WL 6926 (1881); Romine v. Haag, 178 S.W. 147 (Mo. 1915).

Particular ambiguities in description of mortgaged property, see §§ 39 to 41.

[3] Craven v. Butterfield, 80 Ind. 503, 1881 WL 6926 (1881); Romine v. Haag, 178 S.W. 147 (Mo. 1915).

[4] Reed v. Proprietors of Locks & Canals on Merrimac River, 49 U.S. 274, 8 How. 274, 12 L. Ed. 1077, 1850 WL 6843 (1850).

[5] Thornell v. City of Brockton, 141 Mass. 151, 6 N.E. 74 (1886) (deed); Laidley v. Rowe, 275 Pa. 389, 119 A. 474 (1923) (deed).

[6] In re Jared, 474 B.R. 521 (Bankr. S.D. Ohio 2011); Yale Holdings, LLC v. Capital One Bank, 263 Or. App. 71, 326 P.3d 1259 (2014).
Conflict in descriptions, generally, see §§ 46 to 48.

[7] In re Jared, 474 B.R. 521 (Bankr. S.D. Ohio 2011); Yale Holdings, LLC v. Capital One Bank, 263 Or. App. 71, 326 P.3d 1259 (2014).

[8] MTC Financial Inc. v. California Dept. of Tax & Fee Administration, 41 Cal. App. 5th 742, 254 Cal. Rptr. 3d 485 (4th Dist. 2019).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

b. Ambiguities

§ 39. Particular ambiguities in description of mortgaged property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

Whenever land is described by a particular name or designation, parol evidence is admissible to show what land is so designated, and thus to identify the tract referred to.[1]

Where land is described merely by a lot number, or a lot and block number, and an ambiguity arises from the fact that on application of the description to the property there appear to be several lots of the number specified in the instrument, or there appears to be no lot as numbered in the mortgage, or that there is some uncertainty as to just what land is included, parol evidence is usually allowed.[2]

Where the land referred to in a mortgage borders on fresh water such as a river or stream, parol evidence is inadmissible to rebut the presumption that the title extends to the center or thread of the stream, where the language of the instrument does not indicate a different intent; but where there are words in the instrument indicating a different intention, parol evidence is admissible.[3]

Footnotes

1 Brooks Bank & Trust Co. v. Dineen, 97 Conn. 536, 117 A. 551 (1922); Robinson v. Atkins, 105 La. 790, 30 So. 231 (1901).

2 Bray v. Adams, 114 Mo. 486, 21 S.W. 853 (1893); Wetzler v. Nichols, 53 Wash. 285, 101 P. 867 (1909) (deed).

[3] Wheeler v. Wheeler, 111 S.C. 87, 96 S.E. 714 (1918) (deed).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

b. Ambiguities

§ 40. Particular ambiguities in description of mortgaged property—Missing calls for course, distance, or monument

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

In a few cases, it has appeared that the ambiguity in the description of the land in a mortgage consisted in the fact that one or more of the calls for course, distance, or monument was missing; in most of these cases, the ambiguity is apparent on the face of the instrument, but sometimes it does not arise until an application of the description to the property is attempted.[1] Where there is sufficient remaining description to make possible an identification of the land intended to be conveyed, the courts have had no hesitancy about admitting parol evidence to supply the missing calls and to identify the land.[2] In so doing, the courts are not inserting new material matter into the mortgage, but are merely interpreting the intention of the parties to the writing as it is vaguely expressed therein; nor is there any alteration or variation of the contents of the writing.[3]

Footnotes

1 Temple v. Benson, 213 Mass. 128, 100 N.E. 63 (1912) (deed); Webb v. Frazar, 29 S.W. 665 (Tex. Civ. App. 1895).

2 Temple v. Benson, 213 Mass. 128, 100 N.E. 63 (1912) (deed); Webb v. Frazar, 29 S.W. 665 (Tex. Civ. App. 1895).

3 Temple v. Benson, 213 Mass. 128, 100 N.E. 63 (1912) (deed); Webb v. Frazar, 29 S.W. 665 (Tex. Civ. App. 1895).

Works.

54A Am. Jur. 2d Mortgages § 41

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

b. Ambiguities

§ 41. Particular ambiguities in description of mortgaged property—Failure to designate governmentally established subdivisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

In the majority of cases, the rule appears to be that where there is a description in a mortgage sufficient to point out with some definiteness the land intended to be included, the fact that there is a failure to designate the town, township, range, or the like, does not vitiate the instrument, and parol evidence is admissible to identify the land; omitting the name of the state, county, or township will not prejudice where other adequate elements of identification exist.[1] It has also been held, however, that a failure of the instrument to mention the town, county, state, or the like, constitutes a patent ambiguity to explain which parol evidence is inadmissible.[2]

Observation:

The more that these designations are lacking, the more ambiguous the instrument becomes, and the less chance there is of the admission of parol evidence.[3]

Footnotes

[1] Slater v. Breese, 36 Mich. 77, 1877 WL 3728 (1877) (extrinsic evidence admitted where the mortgage failed to mention the town, county, and state in which the land was located); Wilson v. Calhoun, 157 Tenn. 667, 11 S.W.2d 906 (1928) (parol evidence admitted where the mortgage failed to mention the state and county in which the land lay); Atwater v. Schenck, 9 Wis. 160, 1859 WL 2828 (1859) (failure to mention county and state).

[2] Romine v. Haag, 178 S.W. 147 (Mo. 1915) (holding that where a mortgage describes the property intended to be conveyed thereby as being in "section twenty-five (25)," the uncertainty amounted to a patent ambiguity, and parol evidence was not admissible to remove it).

[3] Neas v. Whitener-London Realty Co., 119 Ark. 301, 178 S.W. 390 (1915) (a mortgage which did not give the range number of lands included was insufficient to pass the legal title); Denison-Gholson Dry Goods Co. v. Hill, 135 Tenn. 60, 185 S.W. 723 (1916) (where the mortgage description did not locate the property in any town, county, or state, it was too uncertain to admit of parol evidence to identify the land or correct or apply the attempted description).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

c. References

§ 42. Reference in mortgage to description in extraneous instrument

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 912

Forms

Am. Jur. Legal Forms 2d § 179:311 (Property encumbered—Reference to description in deed—Purchase money mortgage)

It is not necessary that the description in a mortgage be contained in the body thereof; it is sufficient if it refers, for identification, to some other instrument or document, as to another deed or map by which the property may be identified.[1]

Footnotes

[1] Hauseman Motor Co. v. Napierella, 223 Ky. 433, 3 S.W.2d 1084 (1928); American Nat. Bank v. John Van Range Co., 211 Ky. 849, 278 S.W. 133 (1925); Vaughn v. Schmalsle, 10 Mont. 186, 25 P. 102 (1890); MTGLQ Investors, L.P. v. Curnin, 263 N.C. App. 193, 823 S.E.2d 409 (2018).
The description of property in a recorded mortgage or deed is sufficient to place third persons on notice where it contains the correct municipal address, where it refers to other public records that have the correct property description. In re LeBlanc, 604 B.R. 693 (E.D. La. 2019) (under Louisiana law).
A mortgage's property description was sufficient to provide constructive notice to a subsequent mortgage holder that

the mortgage encumbered both a lot with a residence on it and an adjacent vacant lot, rather than only the vacant lot, where, although it was internally inconsistent, the mortgage contained, in addition to a prior deed reference regarding the house lot, some description of the house lot through the tax assessor's plat and lot number and street address. Option One Mortg. Corp. v. Aurora Loan Services, LLC, 78 A.3d 781 (R.I. 2013).

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F. Property and Interests Subject to Mortgage

2. Description

c. References

§ 43. Reference in mortgage to all property of mortgagor

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

Forms

Am. Jur. Legal Forms 2d § 179:312 (Property encumbered—Reference to description in deed—All of mortgagor's property)

The general rule is that a mortgage describing the subject matter thereof as "all" of the mortgagor's property, or "all" of his property in a specified locality, is not defective or void for want of a sufficient description,[1] whether the locality designated is a section[2] or county.[3]

Footnotes

1 Wilson v. Boyce, 92 U.S. 320, 23 L. Ed. 608, 1875 WL 17836 (1875); Higgins v. Higgins, 121 Cal. 487, 53 P. 1081 (1898); Davis v. Horne, 54 Fla. 563, 45 So. 476 (1907).

2 Patterson v. McClenathan, 296 Ill. 475, 129 N.E. 767 (1921) (deed).

3 Snyder v. Bridewell, 167 Ark. 8, 267 S.W. 561 (1924); Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S.W. 358

(1896).

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F. Property and Interests Subject to Mortgage

2. Description

c. References

§ 44. Reference in mortgage to property adjoining or bounded by specified property, street, or road; parol evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

Where a mortgage describes the land intended to be included as bounded by the land of the mortgagor, parol evidence has uniformly been admitted to explain the ambiguity.[1]

Where land is described in a mortgage as bounded on a certain street, road, or alley, and where an ambiguity arises from the fact that the width of the street or road as recorded on a plat or map differs from the width according to its actual use, or from the fact that it is doubtful whether the distance stated in the deed includes the land as far as the center, or only to the edge of the road, parol evidence would seem to be admissible to determine the true limits of the land intended to be conveyed.[2]

Footnotes

[1] Walden v. Walden, 128 Ga. 126, 57 S.E. 323 (1907); Shelby v. Teris, 12 Ky. L. Rptr. 428, 14 S.W. 501 (Ky. 1890).

[2] Rix v. Smith, 145 Mich. 203, 108 N.W. 691 (1906) (deed); Safe Deposit & Trust Co. of Pittsburg v. Bovaird & Seyfang Mfg. Co., 229 Pa. 295, 78 A. 268 (1910) (deed); Bell v. Wright, 94 Tex. 407, 60 S.W. 873 (1901) (deed).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

c. References

§ 45. Reference in mortgage to natural monuments; parol evidence

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 947, 948

Parol evidence appears to be admissible to locate natural monuments, such as trees, paths, fords, and the like, called for in a mortgage, because it is only by such evidence that these monuments can be identified.[1] Where an ambiguity arises in the application of the description to the ground, from the fact that there appear to be two or more monuments answering the description, parol evidence is generally allowed.[2]

Footnotes

1 Williamson v. Pratt, 37 Cal. App. 363, 174 P. 114 (3d Dist. 1918) (deed); Thornell v. City of Brockton, 141 Mass. 151, 6 N.E. 74 (1886) (deed); Taylor v. Meadows, 175 N.C. 373, 95 S.E. 662 (1918) (deed).

2 Williamson v. Pratt, 37 Cal. App. 363, 174 P. 114 (3d Dist. 1918); Thornell v. City of Brockton, 141 Mass. 151, 6 N.E. 74 (1886); Taylor v. Meadows, 175 N.C. 373, 95 S.E. 662 (1918).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

d. Conflict in Descriptions

§ 46. Conflict in descriptions of mortgaged property, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 857, 947

Where there is an inconsistency between the description of land contained in a mortgage and the description in another instrument referred to therein, the court will endeavor to ascertain and effectuate the intention of the parties to the instrument.[1] So where there is a discrepancy between a description in a mortgage and a deed referred to therein, parol evidence of the attendant facts and circumstances has been held admissible to ascertain the intention of the parties.[2] It has been held that where a mortgage contains a specific and definite grant of land by such descriptive words as "my homestead farm" or by some specific name by which it is known, so that it can be located, the title to the whole described or named parcel will pass, in the absence of anything in the mortgage itself indicating a different intention, although less than the whole parcel was covered by the description in the instrument or record to which only a bare reference was made in the mortgage.[3]

Footnotes

1 Pierce v. Adams, 137 Me. 281, 18 A.2d 792, 134 A.L.R. 1033 (1941).
References to extraneous instruments, generally, see § 42.

2 Port Wentworth Terminal Corp. v. Equitable Trust Co. of New York, 18 F.2d 379 (C.C.A. 5th Cir. 1927).

3 Pierce v. Adams, 137 Me. 281, 18 A.2d 792, 134 A.L.R. 1033 (1941).

Works.

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

d. Conflict in Descriptions

§ 47. Conflict between general and specific descriptions of mortgaged property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 857, 947

There are cases in which it has been regarded as proper to treat a particular description of property in a mortgage as surplusage, where it was repugnant to a sufficient general description therein.[1] The courts in other cases, however, either to carry out the intention of the parties or under the rule of construction emphasizing the granting clause of a mortgage, have refused to enlarge the interest specifically mentioned merely because of general language under which a larger interest held by the mortgagor could pass.[2]

General words in a mortgage, purporting prima facie to cover all of the mortgagor's property, were held to be restricted by a more specific preceding description and to apply to property of the same nature or quality only.[3]

Footnotes

1 Johnson v. McKay, 119 Ga. 196, 45 S.E. 992 (1903).

2 Gallardo v. Noble, 236 U.S. 135, 35 S. Ct. 280, 59 L. Ed. 503 (1915) (holding that the crops only, and not the land itself, are included in a mortgage given by a part owner and lessee in possession of a sugar plantation, notwithstanding the recital therein that his mortgage of future crops to secure his indebtedness is "besides the general obligation which he hereby makes of all his property" without the general hindering the special obligation, or the special hindering the general one, and despite the fact that after referring to another indebtedness which must be paid, thereby canceling "that deed of refaccion," the mortgage obligates the mortgagor not to execute any other agreement or deed with damage "to this present one"); Donnan v. Intelligencer Printing & Publishing Co., 70 Mo. 168, 1879 WL 8228 (1879).

[3] State of Alabama v. Montague, 117 U.S. 602, 6 S. Ct. 911, 29 L. Ed. 1000 (1886) (holding that the words "all other property" do not operate to include within the mortgage all the lands belonging to the mortgagor not specifically described); Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228, 183 S.W. 1019 (1916) (holding that in a mortgage describing the property conveyed as mineral lands, furnaces, equipment, and the like, and "all property and estate wherever situate," the quoted phrase refers to all property of a similar nature which may have been overlooked in the detailed description, and does not include cash on hand, commissary stock, iron ore, pig iron, and the like, nor accounts receivable).

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II. Requisites and Validity; Modification

F. Property and Interests Subject to Mortgage

2. Description

d. Conflict in Descriptions

§ 48. Conflict between description of mortgaged property and map, plat, plan, sketch, or diagram

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 857, 947

The description in a mortgage by reference to a map, plat, plan, sketch, or diagram has in some cases been held to prevail over the description by words.[1]

Footnotes

[1] Coles v. Yorks, 36 Minn. 388, 31 N.W. 353 (1887); Hayden v. Hayden, 178 N.C. 259, 100 S.E. 515 (1919); Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S.W.2d 1080, 85 A.L.R. 391 (1932).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 873, 911 to 930

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

1. In General

§ 49. Debts, liabilities, or obligations secured by mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 911 to 930

The debt secured by a mortgage is regarded as the primary obligation between the parties,[1] and the mortgage as incidental to the indebtedness or obligation secured thereby.[2] Under this rule, the lien of a mortgage is regarded as no greater than the actual debt secured.[3]

Footnotes

1 Indiana & I.C.R. Co. v. Sprague, 103 U.S. 756, 26 L. Ed. 554, 1880 WL 18790 (1880); Rossiter v. Merriman, 80 Kan. 739, 104 P. 858 (1909); Shriver v. Sims, 127 Neb. 374, 255 N.W. 60, 94 A.L.R. 779 (1934); Blaisdell v. Coe, 83 N.H. 167, 139 A. 758, 65 A.L.R. 626 (1927); Rennie v. Oklahoma Farm Mortg. Co., 1924 OK 568, 99 Okla. 217, 226 P. 314 (1924).

2 Ewell v. Daggs, 108 U.S. 143, 2 S. Ct. 408, 27 L. Ed. 682 (1883); Shriver v. Sims, 127 Neb. 374, 255 N.W. 60, 94 A.L.R. 779 (1934); State ex rel. Shull v. Moore, 1933 OK 681, 167 Okla. 28, 27 P.2d 1048 (1933); Barbour v. Finke, 47 S.D. 644, 201 N.W. 711, 40 A.L.R. 829 (1924).

3 Grennon v. Kramer, 111 N.J. Eq. 337, 162 A. 758 (Ct. Err. & App. 1932); Thomas v. Scougale, 90 Wash. 162, 155 P. 847 (1916).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

1. In General

§ 50. Necessity of valid obligation underlying mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 911

The existence of an obligation to be secured is an essential element of a mortgage.[1] The mortgage has no efficacy if unaccompanied by a debt or obligation,[2] Accordingly, a mortgage is a nullity except insofar as it secures a valid obligation.[3] In this regard, the extinguishment of the personal liability of one comaker of the note secured by the deed of trust does not impact the lien on the entire property since each comaker encumbered his or her interest in the property to secure his or her own obligation and the obligation of the other comaker.[4]

A distinction must be made between the obligation itself and the note evidencing the obligation; the note is no more than primary evidence of the debt,[5] and no other written evidence thereof than that furnished by the mortgage itself is necessary to sustain the mortgage.[6] Hence, where an obligation secured by the mortgage exists aside from the note or bond, the mortgage is not invalidated by mere defects in,[7] or the invalidity of, the note or bond manifesting the debt.[8]

Footnotes

1 New Orleans Nat. Banking Ass'n v. Adams, 109 U.S. 211, 3 S. Ct. 161, 27 L. Ed. 910 (1883); Stollenwerck v. Marks & Gayle, 188 Ala. 587, 65 So. 1024 (1914); Price v. First Nat. Bank of Atchison, 62 Kan. 735, 64 P. 637 (1901); Mosley v. Cavanagh, 344 Mo. 236, 125 S.W.2d 852 (1939); Palmer v. City of Albuquerque, 1914-NMSC-058, 19 N.M. 285, 142 P. 929 (1914); State ex rel. Shull v. Moore, 1933 OK 681, 167 Okla. 28, 27 P.2d 1048 (1933); Smith v. Headlee, 93 Or. 257, 183 P. 20 (1919); Hawkins v. Everts, 91 S.W.2d 1086 (Tex. Civ. App. Fort Worth 1936), writ refused; Tesdahl v. Collins, 2 Wash. 2d 76, 97 P.2d 649 (1939).

2 County of Keith v. Fuller, 234 Neb. 518, 452 N.W.2d 25 (1990); Shriver v. Sims, 127 Neb. 374, 255 N.W. 60, 94 A.L.R. 779 (1934).

[3] Rodgers v. Rodgers, 988 So. 2d 1041 (Ala. Civ. App. 2007).
A mortgage which purports to secure the payment of debt has no validity if the debt has no existence. Walston v. Twiford, 248 N.C. 691, 105 S.E.2d 62 (1958).

[4] Cache Nat. Bank v. Lusher, 882 P.2d 952 (Colo. 1994).

[5] Rossiter v. Merriman, 80 Kan. 739, 104 P. 858 (1909); Rennie v. Oklahoma Farm Mortg. Co., 1924 OK 568, 99 Okla. 217, 226 P. 314 (1924).

[6] Mandle v. Horspool, 198 Mo. App. 649, 201 S.W. 638 (1918).
Although an obligation secured by a mortgage must be valid and supported by consideration, the obligation need not meet the exacting standards of negotiability under the Uniform Commercial Code, and generally, any obligation capable of being reduced to money value may be secured by a mortgage. Production Credit Ass'n of Mandan v. Obrigewitch, 462 N.W.2d 115 (N.D. 1990).

[7] Reliance Ins. Co. v. Brown, 59 A.D.2d 968, 399 N.Y.S.2d 286 (3d Dep't 1977) (if the obligation secured by mortgage existed aside from the affidavit for judgment by confession, the mortgage itself would not be vitiated by any defects or invalidity of the affidavit); Lierman v. O'Hara, 153 Wis. 140, 140 N.W. 1057 (1913).

[8] Peoples Nat. Bank & Trust Co. v. Pora, 212 Ind. 468, 9 N.E.2d 83, 111 A.L.R. 1402 (1937) (referring to a note containing a provision giving the holder a power of attorney to enter a confession of judgment thereon); Morris v. Linton, 74 Neb. 411, 104 N.W. 927 (1905); Swancey v. Parrish, 62 S.C. 240, 40 S.E. 554 (1902).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

1. In General

§ 51. Personal obligation underlying mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 911, 912

Personal liability, express or implied, is not necessarily incident to a mortgage, and a mortgage may be so framed as to exclude that element.[1]

A mortgage does not necessarily import a personal liability of the mortgagor, where there is no express promise to pay the mortgage debt, or an admission of the indebtedness.[2] Whether the mortgage imposes a personal liability upon the mortgagor depends upon the terms of the mortgage.[3] In this connection, although there is authority predicated upon a contrary theory,[4] it is generally held that in order to create a personal liability of the mortgagor, that condition need not in terms be reserved by any express provision in the mortgage, or in a paper collateral thereto.[5] An implied promise is raised and a personal liability is created by an admission of an indebtedness in a mortgage.[6] It has also been held that a promissory note for the amount secured by a mortgage on real estate given simultaneously with the mortgage does not nullify the obligation of the covenant in the mortgage to pay the debt.[7]

Footnotes

1 Russell v. Southard, 53 U.S. 139, 12 How. 139, 13 L. Ed. 927, 1851 WL 6634 (1851); Federal Trust Co. v. Wolman, 134 Me. 86, 181 A. 815 (1935); Campbell v. Dearborn, 109 Mass. 130, 1872 WL 8720 (1872); Columbus Land, Loan & Bldg. Ass'n of Columbus v. Wolken, 146 Neb. 684, 21 N.W.2d 418, 165 A.L.R. 1285 (1946); Weikel v. Davis, 109 Wash. 97, 186 P. 323 (1919).

2 Hoskins v. Black, 190 Ky. 98, 226 S.W. 384 (1920); Federal Trust Co. v. Wolman, 134 Me. 86, 181 A. 815 (1935); Columbus Land, Loan & Bldg. Ass'n of Columbus v. Wolken, 146 Neb. 684, 21 N.W.2d 418, 165 A.L.R. 1285 (1946) (holding that where a note and mortgage are executed and delivered by the representative of an estate pursuant to

authority granted by statute, this does not make the representative of the estate liable for the debt or obligation so created).

A borrower who conveys property to the lender by an absolute deed, retaining only an option to repurchase, without making any promise to repay the loan, is not personally liable therefor. Hilpert v. C.I.R., 151 F.2d 929, 162 A.L.R. 899 (C.C.A. 5th Cir. 1945).

[3] Allison v. Hollembeak, 138 Iowa 479, 114 N.W. 1059 (1908); Seieroe v. First Nat. Bank, 50 Neb. 612, 70 N.W. 220 (1897); Weikel v. Davis, 109 Wash. 97, 186 P. 323 (1919).

[4] Alexander v. Hergenroeder, 215 Md. 326, 138 A.2d 366 (1958), saying that it has long been the law of Maryland that if a mortgage or deed of trust contains no covenant to pay the indebtedness, no implied covenant to do so arises.

[5] Helbreg v. Schumann, 150 Ill. 12, 37 N.E. 99 (1894); Palmer v. City of Albuquerque, 1914-NMSC-058, 19 N.M. 285, 142 P. 929 (1914); Graham v. Stevens, 34 Vt. 166, 1861 WL 3383 (1861).

[6] Hoskins v. Black, 190 Ky. 98, 226 S.W. 384 (1920).

[7] Guardian Depositors Corp. of Detroit v. Savage, 287 Mich. 193, 283 N.W. 26, 124 A.L.R. 635 (1938).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

a. In General

§ 52. Obligations other than existing or specified indebtedness underlying mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 911, 920

A mortgage need not be founded on a present debt,[1] but may be given to secure the performance of other obligations.[2] The mortgage may be made to indemnify against a contingency which may in fact never occur.[3]

Footnotes

1 Kansas City Life Ins. Co. v. Banaka, 150 Kan. 334, 92 P.2d 63 (1939); Larson Cement Stone Co. v. Redlim Realty Co., 179 Neb. 134, 137 N.W.2d 241 (1965).

2 Kansas City Life Ins. Co. v. Banaka, 150 Kan. 334, 92 P.2d 63 (1939); Palmer v. City of Albuquerque, 1914-NMSC-058, 19 N.M. 285, 142 P. 929 (1914).

3 Kansas City Life Ins. Co. v. Banaka, 150 Kan. 334, 92 P.2d 63 (1939).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

a. In General

§ 53. Mortgage securing obligations in addition to those contemplated by parties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 920

Ordinarily, a mortgage or deed of trust does not secure obligations which were not contemplated by the parties to be secured thereby.[1] This doctrine permits parol testimony only to show the intention of the parties at the time the mortgage was executed, and not to establish a subsequent agreement, in effect creating a new mortgage, to extend the mortgage to secure additional obligations,[2] at least as against others who have acquired rights in the property.[3] The parties to a mortgage or deed of trust may by a written agreement extend the security of the mortgage or deed to cover an additional indebtedness.[4]

Footnotes

1 Weatherwax v. Heflin, 244 Ala. 210, 12 So. 2d 554 (1943); Jones v. Sturgis, 118 Colo. 579, 199 P.2d 645 (1948); Belton v. Farmers' & Merchants' Bank & Trust Co., 186 N.C. 614, 120 S.E. 220 (1923); Healy v. Fidelity Sav. Bank, 238 Wis. 12, 298 N.W. 170 (1941).
A renewal note including additional indebtedness is not secured by the original mortgage in the additional amount, unless this protection is waived in the mortgage. In re Mancle, 314 B.R. 397 (Bankr. E.D. Ark. 2004).
Deeds of trust, generally, see §§ 109 to 121.

2 Weatherwax v. Heflin, 244 Ala. 210, 12 So. 2d 554 (1943); Lindsay v. Garvin, 31 S.C. 259, 9 S.E. 862 (1889); Healy v. Fidelity Sav. Bank, 238 Wis. 12, 298 N.W. 170 (1941).

3 Heller v. Gate City Bldg. & Loan Ass'n, 1965-NMSC-152, 75 N.M. 596, 408 P.2d 753 (1965).

4 Jones v. Sturgis, 118 Colo. 579, 199 P.2d 645 (1948) (recognizing rule); Riess v. Old Kent Bank, 253 Mich. 557, 235

N.W. 252, 76 A.L.R. 571 (1931); People's State Bank of Lakota v. Francis, 8 N.D. 369, 79 N.W. 853 (1899).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

b. Future Obligations and Advances

§ 54. Future obligations and advances as secured by mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 921

Forms

Am. Jur. Legal Forms 2d §§ 179:300 to 179:303 (Obligation secured—Future advances)
Am. Jur. Legal Forms 2d § 179:304 (Obligation secured—Present and future indebtedness)

In the absence of a statute to the contrary,[1] and subject to certain limitations,[2] the prevailing rule is that a mortgage may be valid even though given to secure future advances.[3] Under this rule, the obligation secured need not actually be in existence at the date of the execution of the mortgage, but may legally be given to secure advances to be made to the mortgagor, or other obligations to be assumed by him or her, in the future,[4] or to indemnify against future liabilities to be incurred in his or her behalf.[5] Indeed, it would be a great hardship if a different rule obtained, for mortgages of this character enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security on each new transaction.[6]

Practice Tip:

A future advances clause must be strictly construed against the mortgagee.[7]

Where husband and wife mortgagors hold property as tenants by the entirety (individually vested with title to the whole estate), neither spouse has an interest in the property that can be encumbered without the joinder of the other spouse; thus, the subsequent indebtedness of only one of the mortgagors cannot become a lien on the nonconsenting mortgagor's interest in the property.[8]

Footnotes

1 Leister v. Carroll County Nat. Bank of Westminster, 199 Md. 241, 86 A.2d 393, 31 A.L.R.2d 657 (1952), holding that a mortgage to secure the repayment of money to be advanced in the unspecified future, declared invalid by statute, will not be given effect as an equitable lien to the extent of the amount subsequently advanced thereunder, but that a mortgage securing the repayment of a contemporaneous loan, and of money to be advanced in the unspecified future, should not be held totally invalid as one for a future advance, but should be declared invalid only to the extent of the future advance.

2 §§ 55, 56.

3 New Orleans Nat. Banking Ass'n v. Le Breton, 120 U.S. 765, 7 S. Ct. 772, 30 L. Ed. 821 (1887); In re Windham, 568 B.R. 263 (Bankr. N.D. Miss. 2017) (under Mississippi law); GHB Construction and Development Company, Inc. v. West Alabama Bank and Trust, 290 So. 3d 793 (Ala. 2019); Potwin State Bank v. J. B. Houston & Son Lumber Co., 183 Kan. 475, 327 P.2d 1091, 80 A.L.R.2d 166 (1958); Lamar v. Nylen, 240 Md. 740, 215 A.2d 806 (1966); Deutsche Bank Nat. Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 28 N.E.3d 416 (2015); Larson Cement Stone Co. v. Redlim Realty Co., 179 Neb. 134, 137 N.W.2d 241 (1965); Batten v. Jurist, 306 Pa. 64, 158 A. 557, 81 A.L.R. 625 (1932).

4 W. L. Development Corp. v. Trifort Realty, Inc., 44 N.Y.2d 489, 406 N.Y.S.2d 437, 377 N.E.2d 969 (1978), holding that a mortgage given to secure payment for future work pursuant to a written construction contract constitutes a valid mortgage.
Description of future obligations secured, see § 67.

5 New Orleans Nat. Banking Ass'n v. Le Breton, 120 U.S. 765, 7 S. Ct. 772, 30 L. Ed. 821 (1887); First Nat. Bank v. Bain, 237 Ala. 580, 188 So. 64 (1939); Corn Belt Trust & Savings Bank of Belle Plaine v. May, 197 Iowa 54, 196 N.W. 735 (1924); Kolar v. Eckhardt, 119 Kan. 518, 240 P. 947 (1925); Taulbee v. First Nat. Bank, 279 Ky. 153, 130 S.W.2d 48 (1939); Diggs v. Fidelity & Deposit Co. of Md., 112 Md. 50, 75 A. 517 (1910); Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 214 N.W. 503, 53 A.L.R. 573 (1927).
A mortgage to secure future and present advances is made where the instrument recites that it is in consideration of advances of specified amounts presently made, "and in consideration of further advances to be made," although the instrument also recites that it is to secure "the total sum now advanced," and although the instrument contains no specific limitation of the amount to be advanced and no reference to any contract pursuant to which the money would be advanced. American Sur. Co. of N.Y. v. Sundberg, 58 Wash. 2d 337, 363 P.2d 99, 90 A.L.R.2d 1168 (1961).

6 Jones v. New York Guaranty & Indemnity Co., 101 U.S. 622, 25 L. Ed. 1030, 1879 WL 16637 (1879); Kentucky Lumber & Mill Work Co. v. Kentucky Title Savings Bank & Trust Co., 184 Ky. 244, 211 S.W. 765, 5 A.L.R. 391 (1919); Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 214 N.W. 503, 53 A.L.R. 573 (1927).

7 National Loan Investors, L.P. v. Martin, 488 N.W.2d 163, 19 U.C.C. Rep. Serv. 2d 193 (Iowa 1992).
Construction and interpretation of mortgage, generally, see §§ 7 to 9.

8 Bellows Falls Trust Co. v. Gibbs, 148 Vt. 633, 534 A.2d 210 (1987).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

b. Future Obligations and Advances

§ 55. Future obligations and advances as secured by mortgage—Necessity of obligation of mortgagee to make advances

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 921

In regard to the validity of a mortgage for future advances, a distinction is made in some cases between mortgages in which the mortgagee is obliged to advance a given sum and those in which he or she is not so bound.[1] In the absence of a statutory provision mandating a different result, however, an obligation of a mortgagee to make the future advances is not essential to the validity of a mortgage to secure such advances.[2]

Footnotes

1 Benton-Shingler Co. v. Mills, 13 Ga. App. 632, 79 S.E. 755 (1913) (under statute); Western Nat. Bank v. Jenkins, 131 Md. 239, 101 A. 667, 1 A.L.R. 1577 (1917) (under statute); Southern Trust Mortg. Co. v. K & B Door Co., Inc., 104 Nev. 564, 763 P.2d 353 (1988) (holding that since the deed of trust created a clear contractual duty in the lender to supply the future advances, the advances were secured by the deed of trust); Second Nat. Bank of Warren v. Boyle, 155 Ohio St. 482, 44 Ohio Op. 440, 99 N.E.2d 474 (1951) (holding that where there is no obligation to make future advances, a mortgage cannot secure such advances until they are made, and that a duly recorded mortgage purporting to secure such advances will not secure a subsequent advance which does not appear to have been made in reliance upon and on the face of the security of the mortgage).

2 Langerman v. Puritan Dining Room Co., 21 Cal. App. 637, 132 P. 617 (3d Dist. 1913).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

b. Future Obligations and Advances

§ 56. Extension of mortgages to future advances; limitation to advances contemplated by parties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 921

A mortgage cannot secure future advances unless it was intended to do so at the time of its execution, and subsequent parol agreements by the parties that it should have that effect are nugatory.[1] It has also been stated as a broad proposition that a general agreement to secure future advances must be confined to those which are in the contemplation of the parties at the time the agreement is made,[2] and cannot be enlarged or extended to cover future advances as against others who have acquired rights in the property.[3]

Where a mortgage or the accompanying agreement expressly stipulates the aggregate amount of advances which are to be covered by the mortgage, the coverage is limited to a total of the amount specified, including all advances made, although partial payments may have brought the balance still due down to less than the amount named in the mortgage.[4]

Footnotes

1 Weatherwax v. Heflin, 244 Ala. 210, 12 So. 2d 554 (1943); In re Dunlap's Estate, 184 Wis. 345, 199 N.W. 387 (1924).

2 In re Trampush, 552 B.R. 817 (Bankr. W.D. Wis. 2016) (under Wisconsin law); Weatherwax v. Heflin, 244 Ala. 210, 12 So. 2d 554 (1943); Provident Mut. Bldg. Loan Ass'n v. Shaffer, 2 Cal. App. 216, 83 P. 274 (2d Dist. 1905); Huntington v. Kneeland, 102 A.D. 284, 92 N.Y.S. 944 (2d Dep't 1905), aff'd, 187 N.Y. 563, 80 N.E. 1111 (1907).

[3] Heller v. Gate City Bldg. & Loan Ass'n, 1965-NMSC-152, 75 N.M. 596, 408 P.2d 753 (1965).

[4] Bondurant v. Tally's Trustee, 191 Ky. 202, 229 S.W. 377 (1921).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

c. Provision Purporting to Cover Unspecified Debts; "Dragnet" Clause

§ 57. Debts, liabilities, or obligations secured by mortgage under dragnet clause, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 921

A.L.R. Library

Necessity of Production of Original Note Involved in Mortgage Foreclosure—Twenty-First Century Cases, 86 A.L.R.6th 411

Debts included in provision of mortgage purporting to cover all future and existing debts (Dragnet Clause)—modern status, 3 A.L.R.4th 690

Parties to a loan transaction may agree that a mortgage or security agreement given to secure a particular debt may also, by its terms, secure existing or future debt.[1] Thus, mortgages with "dragnet" clauses, which purport to secure all present and future debts, are enforceable,[2] even if disfavored.[3] The courts will recognize and enforce a dragnet clause as long as the language of the clause is plain and unambiguous.[4]

Where a mortgage contains a dragnet clause specifically worded to cover all indebtedness of past or future origin, unless there is something in the wording of the mortgage or in the dragnet clause which would confine the operation of that clause to advances made or debts already existing at the date of the mortgage, the security clause of the mortgage will, under the dragnet clause, embrace advances made or debts created subsequently to the execution of the mortgage and before its satisfaction or foreclosure.[5] Thus, under the construction placed on the wording of some mortgages, future, and not already existing debts, have been held to be contemplated, particularly where the mortgage was written upon a printed form, with a

printed "dragnet" clause.[6] Debts contracted contemporaneously with the execution of the mortgage have also been held within the coverage of a "dragnet" clause embracing "any other indebtedness" which the mortgagor may owe to the mortgagee.[7] Where the wording justifies such an interpretation, however, the security of the mortgage may be confined to past advances or debts or to such future advances only as may be necessary to preserve the security of the mortgage or its foreclosure.[8]

While it has been held that a deed to secure a debt with an open-end or dragnet clause will continue to be effective only so long as there exists indebtedness between the grantor and grantee,[9] there is also authority for the continued effectiveness of a dragnet clause even after the original obligation secured by the mortgage was extinguished.[10]

A legally enforceable dragnet clause can by itself validate a mortgage when there is proof of the underlying antecedent debt secured by the dragnet clause[11] and the mortgage clearly indicates that the parties intended for the mortgage to secure antecedent debt.[12]

Practice Tip:

"Dragnet" clauses in mortgages are often looked upon with disfavor and have been carefully scrutinized and strictly construed.[13]

Footnotes

1 Equity Bank v. Southside Baptist Church of Lead Hill, 2020 Ark. App. 199, 599 S.W.3d 133 (2020).

2 In re Windham, 568 B.R. 263 (Bankr. N.D. Miss. 2017) (under Mississippi law); Blue Grass Savings Bank v. Community Bank & Trust Company, 941 N.W.2d 20 (Iowa 2020).

3 Blue Grass Savings Bank v. Community Bank & Trust Company, 941 N.W.2d 20 (Iowa 2020).

4 In re Poole, 612 B.R. 882 (Bankr. E.D. Tenn. 2019) (under Tennessee law).

5 Union Bank v. Wendland, 54 Cal. App. 3d 393, 126 Cal. Rptr. 549 (1st Dist. 1976), overturned on other grounds due to legislative action, CA B. An., S.B. 1069 Sen.(May 1, 2012); Langerman v. Puritan Dining Room Co., 21 Cal. App. 637, 132 P. 617 (3d Dist. 1913); Moultrie Banking Co. v. Mobley, 170 Ga. 402, 152 S.E. 903 (1930); Farr v. Nichols, 132 N.Y. 327, 30 N.E. 834 (1892); Brunson v. Dawson State Bank, 175 S.W. 438 (Tex. Civ. App. Dallas 1915).
The dragnet clause in deeds of trust securing initial acquisition and development loans from the lender to the borrower were enforceable against all of the loans, including subsequent construction loans for housing development not in default, where the language and the parties' intention were clear, the loans were all related, and all of the deeds of trust contained the identical dragnet clause. L.B. Nelson Corp. of Tucson v. Western American Financial Corp., 150 Ariz. 211, 722 P.2d 379 (Ct. App. Div. 2 1986).

6 First Nat. Bank v. Corning Bank & Trust Co., 168 Ark. 17, 268 S.W. 606 (1925); Farmers Nat. Bank of Cherokee v. De Fever, 1936 OK 577, 177 Okla. 561, 61 P.2d 245 (1936); McCollum v. Braddock Trust Co., 330 Pa. 293, 198 A. 803 (1938).

7 Dempsey v. Portis Mercantile Co., 196 Ark. 751, 119 S.W.2d 915 (1938); Dudley v. Reconstruction Finance Corp., 188 Ga. 91, 2 S.E.2d 907 (1939).

8 Hendricks v. Webster, 159 F. 927 (C.C.A. 8th Cir. 1908); Monroe County Bank v. Qualls, 220 Ala. 499, 125 So. 615 (1929) (construing the wording of the "dragnet" clause, "any other debts due or advances received," to have reference only to advances made or debts created or falling due prior to the execution of the mortgage); Citizens Bank & Trust

Co. of Washington v. Gibson, 490 N.E.2d 728 (Ind. 1986).
A dragnet clause did not cover additional loans since there was no evidence that advances were discussed or considered at time of mortgages or that such advances were intended to be covered by mortgages. Freese Leasing, Inc. v. Union Trust and Sav. Bank, Stanwood, 253 N.W.2d 921, 3 A.L.R.4th 681 (Iowa 1977).
In the absence of clear, supportive evidence of a contrary intention, a mortgage containing a dragnet-type clause will not be extended to cover future advances unless the advances are of the same kind and quality or relate to the same transaction or series of transactions as the principal obligation secured, or unless the document evidencing the subsequent advance refers to the mortgage as providing security therefor. Decorah State Bank v. Zidlicky, 426 N.W.2d 388 (Iowa 1988); Emporia State Bank & Trust Co. v. Mounkes, 214 Kan. 178, 519 P.2d 618 (1974).
In order to be effective, the subsequent debt asserted by the mortgagee to be secured by the dragnet clause must be of the same general kind as the debt specifically secured, or sufficiently related to the original debt that the consent of the debtor may be inferred. NAB Asset Venture III, L.P. v. Brockton Credit Union, 62 Mass. App. Ct. 181, 815 N.E.2d 606 (2004).

9 McGlaun v. Southwest Georgia Production Credit Ass'n, 256 Ga. 648, 352 S.E.2d 558 (1987).
A security deed containing an open-end or dragnet clause will continue to be effective so long as an indebtedness arising out of contract between the original parties to the deed continuously exists from the deed's date. Brinson v. McMillan, 263 Ga. 802, 440 S.E.2d 22 (1994).

10 State Bank of Albany v. Fioravanti, 51 N.Y.2d 638, 435 N.Y.S.2d 947, 417 N.E.2d 60, 30 U.C.C. Rep. Serv. 731 (1980), holding that where the dragnet clause of a mortgage, which recited that the mortgage was intended to secure future indebtedness of the mortgagor to the mortgagee provided that the maximum secured thereby should be the original principal amount of the mortgage ($2,500), operated to secure $2,500 of a $3,027 indebtedness created by a loan from the mortgagee to the mortgagor made six years after the original bond had been executed, the mortgagee was entitled to foreclose on the mortgage against the grantee of the mortgagor who took with notice of the encumbrance, notwithstanding that at the time of foreclosure the original obligation secured by the mortgage had been extinguished.

11 Mitchell Bank v. Schanke, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004).

12 In re Octagon Roofing, 124 B.R. 522 (Bankr. N.D. Ill. 1991) (applying Illinois law); Mitchell Bank v. Schanke, 2004 WI 13, 268 Wis. 2d 571, 676 N.W.2d 849 (2004).
A dragnet clause in a mortgage on a borrower's house did not cause the mortgage to include a preexisting debt of a borrower on a guaranty of the borrower's corporation's loans from the same lender where the mortgage did not give notice that the guaranty was included. In re Bass, 44 B.R. 113 (Bankr. D. N.M. 1984) (applying New Mexico law).

13 Lundgren v. National Bank of Alaska, 756 P.2d 270 (Alaska 1987); Bill Grunder's Sons Const., Inc. v. Ganzer, 686 N.W.2d 193 (Iowa 2004).
Construction and interpretation of mortgage, generally, see §§ 7 to 9.
In an action brought by a bank against a son, his wife and his mother, for collection of four promissory notes executed on various dates by the son and to foreclose on collateral including a deed of trust lien executed by the son, his wife and his mother, a "dragnet clause" in the deed of trust providing that the deed of trust was being made "to secure and enforce the payment of all other indebtedness now owing or in the future may be owing by mortgagors to mortgagee," did not purport to secure indebtedness owed by "either or any of them"; thus, subsequent notes executed by the son alone were not secured by the future indebtedness clause of the deed of trust. Bank of Woodson v. Hibbitts, 626 S.W.2d 133 (Tex. App. Eastland 1981), writ refused n.r.e.

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

c. Provision Purporting to Cover Unspecified Debts; "Dragnet" Clause

§ 58. Coverage under mortgage dragnet clause as affected by character of debt and mode of its creation or acquisition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 921

It has been held that under the construction placed upon a particular "dragnet" clause, the mortgage which contains it is security for an indebtedness of the mortgagor, not directly to the mortgagee, but to a third party by whom it has been transferred, assigned, or indorsed to the mortgagee.[1] The same result has been reached as to notes executed by the mortgagor to an assignee of the mortgage after the latter had acquired the mortgage by assignment from the mortgagee,[2] but under the construction placed upon other "dragnet" clauses of similar or varying terminology, it has been held that the security of a mortgage does not extend to claims acquired by the mortgagee (or his assignee) against the mortgagor.[3] On the other hand, it has been held that a mortgage securing the mortgagee and his or her assignee, and covering future advances, secures not only the future advances made by the mortgagee, but also those made by the assignee of the mortgage.[4] Yet a contrary position has been taken in some cases, on the theory that the indebtedness to the assignee, whether existing at the time of the execution of the mortgage or subsequently incurred, was not within the contemplation of the original parties to the mortgage.[5]

The question whether a "dragnet" clause in a mortgage covers the secondary liabilities of the mortgagor to the mortgagee, such as liabilities as surety, indorser, and the like, is one of intention, to be determined from the wording of the mortgages.[6] A clause in a mortgage, providing that the mortgage which secured all indebtedness already owing, all indebtedness hereafter created and all other indebtedness that may accrue by reason of the mortgagors becoming surety or endorser of any other person, has been construed as covering both a personal loan to the mortgagors and other indebtedness subsequently created when the mortgagors become sureties for a loan to a third party, even though the clause does not specifically describe the indebtedness in terms of a dollar amount.[7]

Decisions have also been made as to the coverage of such miscellaneous indebtedness as the amount paid by a second mortgagee to satisfy the first mortgage,[8] indebtedness of or advances made to a grantee of the mortgagor,[9] and the

indebtedness of a receiver of a mortgagor corporation.[10]

Footnotes

1 Collins v. Gregg, 109 Iowa 506, 80 N.W. 562 (1899); First Nat. Bank v. Byard, 26 N.J. Eq. 255, 1875 WL 6872 (Ch. 1875); Lamoille County Sav. Bank & Trust Co. v. Belden, 90 Vt. 535, 98 A. 1002 (1916).

2 Strong Hardware Co. v. Gonyow, 105 Vt. 415, 168 A. 547 (1933).

3 Provident Mut. Bldg. Loan Ass'n v. Shaffer, 2 Cal. App. 216, 83 P. 274 (2d Dist. 1905); First Nat. Bank v. Combs, 208 Ky. 763, 271 S.W. 1077 (1925).

4 Price v. Williams, 179 Ark. 12, 13 S.W.2d 822 (1929).

5 Belton v. Farmers' & Merchants' Bank & Trust Co., 186 N.C. 614, 120 S.E. 220 (1923); Republic Nat. Bank of Dallas v. Zesmer, 187 S.W.2d 227 (Tex. Civ. App. Dallas 1945).

6 Cotton v. First Nat. Bank, 228 Ala. 311, 153 So. 225 (1934) (in view of the particular wording of the "dragnet" clause, the debts that it secures are direct debts of the mortgagor to the mortgagee, and not debts for which the mortgagor is liable merely as surety or indorser).
Where the secondary liability of the mortgagor has been converted into primary liability by the giving of the mortgagor's own note for default notes on which he was liable merely as an indorser, the mortgage secured such individual notes of the mortgagor. First Nat. Bank v. Bain, 237 Ala. 580, 188 So. 64 (1939).

7 Commercial Bank v. Rockovits, 499 N.E.2d 765 (Ind. Ct. App. 1986).

8 Crutchfield v. Johnson & Latimer, 243 Ala. 73, 8 So. 2d 412 (1942).

9 Walker v. Whitmore, 165 Ark. 276, 262 S.W. 678 (1924), holding that a deed of trust given to secure a promissory note, which contained a further provision that the deed should be security for any other indebtedness of whatever kind or character that might be owing by the grantor to the deed of trust beneficiary up to the time of the foreclosure of the deed, whether then matured or not, secured future advances made only to the grantor in the deed of trust, and not to one who purchased the property from the grantor.

10 Clifford v. West Hartford Creamery Co., 103 Vt. 229, 153 A. 205 (1931), ruling that money borrowed from a bank by a receiver of a corporation for which he issued certificates is not "other indebtedness" within the contemplation of a mortgage executed by the corporation to secure a debt and other indebtedness due and owing from the corporation to the mortgagee.

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

c. Provision Purporting to Cover Unspecified Debts; "Dragnet" Clause

§ 59. Coverage under mortgage dragnet clause as affected by joint or individual nature of mortgage and indebtedness

Topic Summary | Correlation Table | References

West's Key Number Digest

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In some cases, a "dragnet" clause has been so construed as to extend the security of a mortgage executed by joint mortgagors to individual indebtedness of one of them afterward created,[1] at least in the absence of allegations of fraud or ambiguities.[2] In other cases, however, under particular circumstances, a joint mortgage containing such a clause has been held to constitute no security for the subsequently created individual debt of a comortgagor.[3]

As to the individual indebtedness of one of the joint mortgagors already in existence at the time of the execution of the mortgage, it has been held that the security of the mortgage does not extend to such indebtedness unless the comortgagor knew of the existence thereof and assented to its being secured by the mortgage.[4]

Footnotes

[1] In re Presser, 504 B.R. 452 (Bankr. S.D. Ohio 2014) (under Ohio law); Luverne Land Co. v. Bank of Luverne, 200 Ala. 85, 75 So. 461 (1917); Lamoille County Sav. Bank & Trust Co. v. Belden, 90 Vt. 535, 98 A. 1002 (1916).
The bank was entitled to foreclose a deed of trust against homestead property for advances made to the husband, acting alone and without the wife's knowledge, which were additional to the original indebtedness secured by the deed of trust contract where the contract contained a "dragnet clause" which clearly and unambiguously provided that its purpose was to "secure all loans and advances which Beneficiary has made or may hereafter make to the Grantor, or any of them." Newton County Bank, Louin Branch Office v. Jones, 299 So. 2d 215 (Miss. 1974),
The complainant's undivided interest in property, owned by him and his two brothers as tenants in common and

conveyed in a deed of trust executed to bank by the complainant, his wife, and his two brothers to secure the note signed by them, secured a loan subsequently made by the bank to one of the complainant grantor's brothers, where the trustee provided that it was given to secure payment of any and all indebtedness to the bank by the undersigned, or either of them, even though the second note was executed without the complainant grantor's knowledge or consent. Wright v. Lincoln County Bank, 62 Tenn. App. 560, 465 S.W.2d 877 (1970).

[2] In re Windham, 568 B.R. 263 (Bankr. N.D. Miss. 2017) (under Mississippi law).

[3] Matter of Ladner, 50 B.R. 85 (Bankr. S.D. Miss. 1985) (applying Mississippi law); Citizens Bank & Trust Co. of Washington v. Gibson, 490 N.E.2d 728 (Ind. 1986); Decorah State Bank v. Zidlicky, 426 N.W.2d 388 (Iowa 1988).

[4] First v. Byrne, 238 Iowa 712, 28 N.W.2d 509, 172 A.L.R. 1072 (1947); McCollum v. Braddock Trust Co., 330 Pa. 293, 198 A. 803 (1938).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

2. Obligations Other Than Existing or Specified Indebtedness

c. Provision Purporting to Cover Unspecified Debts; "Dragnet" Clause

§ 60. Effect of existence of other security on operation of mortgage dragnet clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 921

There is authority to the effect that a "dragnet" clause so worded as to be broad enough to cover all other debts in addition to the one specifically secured will be construed to cover another debt, although such other debt is secured by another mortgage.[1] Independent loans secured by different security, however, have been held not covered by the mortgage in question under the construction placed on the "dragnet" clause in some mortgages.[2]

Footnotes

1 Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 P. 1077 (1905); Exchange Trust Co. v. Hitchcock, 249 Mass. 547, 144 N.E. 373 (1924); Baker v. Building & Loan Ass'n of Jackson, 168 Miss. 808, 152 So. 288 (1934).

2 Page v. American Bank of Commerce & Trust Co., 167 Ark. 607, 269 S.W. 561 (1925); Tennis Coal Co. v. Asher & Hensley, 143 Ky. 223, 136 S.W. 197 (1911); First Sec. Bank of Utah v. Shiew, 609 P.2d 952 (Utah 1980) (holding that where the dragnet clause was a standard boiler plate provision inserted by the mortgagee in a mortgage on a home owned by a husband and wife and the mortgage was to secure a loan for the purchase of their home, and where a subsequent security agreement to finance a cattle-raising business venture failed to mention that the obligation was also secured by the real estate mortgage and in fact refuted such consequence by an integration clause which recited it constituted the entire agreement between the parties, the legal effect of such integration clause was the preclusion of any claim by the bank that it had accepted the mortgagors' continuing offer to secure future advances with the real estate mortgage on their home).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

3. Obligations of Third Persons

§ 61. Mortgage as securing obligation of third person, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 913

Mortgages may be executed to secure the obligations of third persons.[1] Property owners may not be compelled against their will, however, to put their own property up as security for the debt of another.[2] In addition, one who appears to be a principal whether by terms of a written agreement or otherwise may show that he or she is in fact a surety except as against persons who have acted on the faith of the individual's apparent character of principal.[3]

Footnotes

1 Cross v. Allen, 141 U.S. 528, 12 S. Ct. 67, 35 L. Ed. 843 (1891); Berg v. eHome Credit Corp., 848 F. Supp. 2d 841 (N.D. Ill. 2012) (under Illinois law); In re Barger, 490 B.R. 744 (Bankr. S.D. Ohio 2012) (under Ohio law); Riddle v. La Salle Nat. Bank, 34 Ill. App. 2d 116, 180 N.E.2d 719 (1st Dist. 1962); State Bank of Downs v. Criswell, 155 Kan. 314, 124 P.2d 500 (1942); Flemingv. Barden, 126 N.C. 450, 36 S.E. 17 (1900); Middlefield Banking Co. v. Deeb, 2012-Ohio-3191, 2012 WL 2874893 (Ohio Ct. App. 11th Dist. Geauga County 2012); Wilbanks v. Wilbanks, 160 Tex. 317, 330 S.W.2d 607 (1960).

2 West Bay Realty Corp. v. Gad-Sal Realty Corp., 56 A.D.2d 844, 392 N.Y.S.2d 83 (2d Dep't 1977).
Duress, generally, see § 28.

3 State of Wis. Inv. Bd. v. Hurst, 410 N.W.2d 560 (S.D. 1987).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

3. Obligations of Third Persons

§ 62. Relationship of parties in connection with mortgage securing obligation of third person

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 913

A suretyship relation may be effected by a mortgage given to secure the obligation of a third person.[1] An agreement between a mortgagor and a third person, however, under which the third person, independently of any conveyance to him- or herself of the mortgaged premises, agrees to become responsible for the payment of the mortgage debt, has been held not to make the mortgagor a surety, or change the character of his or her obligation to the mortgagee.[2]

Footnotes

1 Cross v. Allen, 141 U.S. 528, 12 S. Ct. 67, 35 L. Ed. 843 (1891); First v. Byrne, 238 Iowa 712, 28 N.W.2d 509, 172 A.L.R. 1072 (1947) (holding that if under a joint mortgage given by cotenants the interest of one cotenant is mortgaged to secure the individual debt of the other, a relationship of suretyship is created); Diehl v. Davis, 75 Kan. 38, 88 P. 532 (1907); Foster v. First Nat. Bank & Trust Co. of Tulsa, 1937 OK 90, 179 Okla. 496, 66 P.2d 79 (1937).

2 Federal Land Bank of Columbia v. Conger, 55 Ga. App. 11, 189 S.E. 567 (1936), holding that the general rule that where the grantee of mortgaged land assumes and agrees to pay the mortgage, he or she becomes at least as to the mortgagor the principal debtor, the latter occupying the position of surety, does not prevail.

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

4. Interest

§ 63. Mortgage to secure payment of debt as also securing payment of interest, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 922

A mortgage given to secure the payment of a debt secures also the payment of interest accruing thereon.[1]

Footnotes

[1] Kleis v. McGrath, 127 Iowa 459, 103 N.W. 371 (1905) (holding that a note given for interest on another note which is secured by a mortgage is itself so secured); MacNeil Bros. Co. v. Cambridge Sav. Bank, 334 Mass. 360, 135 N.E.2d 652 (1956).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

4. Interest

§ 64. Mortgage provisions pertaining to rate of interest

Topic Summary | Correlation Table | References

West's Key Number Digest

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Validity, construction, and application of provisions entitling mortgagee to increase interest rate on transfer of mortgaged property, 92 A.L.R.3d 822

A provision in a note providing that the lender may, in the absence of demonstrated increased risk, raise the interest rate on a loan when the mortgaged property is transferred is valid and enforceable where both parties agree to all the terms in the note and mortgage and there is no suggestion of duress, misrepresentation, or overreaching on the part of the lender.[1]

The provisions of the constitution of any state expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders and the provisions of any state law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved will not apply to any loan, mortgage, or advance which is insured under Title I or II of the Housing Act of 1964.[2] The provisions of this law may, however, be superseded by a state's adoption of an overriding law.[3]

The general validity of a stipulation in an interest-bearing obligation that it shall bear a higher but lawful rate of interest after maturity has been applied as to interest on a mortgage indebtedness.[4] Interest owed by a mortgagor following a default on a purchase money mortgage is required to be calculated at the note and mortgage rate from the date of the mortgagor's late payment to the date the mortgagee declares default and accelerates the mortgage, and at the statutory rate beginning on the date of acceleration to the date of judgment or payment into court of the full amount due.[5] It has also been held that a

provision of a mortgage note for an increased rate of interest from the due date on all payments not made when due puts the increased rate into effect as to the portion of the obligation becoming due by virtue of an acceleration clause, but only from the acceleration date.[6]

Observation:

The default interest provision of a promissory note secured by a deed of trust is not automatically triggered when the note matures and the borrower fails to make the lump-sum payment of principal and interest when due, where the default interest provision is part of an acceleration clause; once the promissory note matures, the acceleration clause cannot be triggered because there is nothing to accelerate.[7]

Footnotes

1 Miller v. Pacific First Federal Sav. and Loan Ass'n, 86 Wash. 2d 401, 545 P.2d 546, 92 A.L.R.3d 815 (1976). Duress, generally, see § 28.

2 12 U.S.C.A. § 1735f-7(a).

3 Autrey v. United Companies Lending Corp., 872 F. Supp. 925 (S.D. Ala. 1995)referring to 12 U.S.C.A. § 1735f-7a(b)(2), (b)(4).

4 Federal Land Bank of Omaha v. Wilmarth, 218 Iowa 339, 252 N.W. 507, 94 A.L.R. 1338 (1934); Sheldon v. Pruessner, 52 Kan. 579, 35 P. 201 (1894).

5 Hammerstein v. Henry Mountain Corp., 11 A.D.3d 836, 784 N.Y.S.2d 657 (3d Dep't 2004).

6 Federal Land Bank of Omaha v. Wilmarth, 218 Iowa 339, 252 N.W. 507, 94 A.L.R. 1338 (1934).

7 JCC Development Corp. v. Levy, 208 Cal. App. 4th 1522, 146 Cal. Rptr. 3d 635 (2d Dist. 2012).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

5. Description of Obligations Secured

§ 65. Description of obligations secured by mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 912

A valid mortgage contains a description of the obligation it is intended to secure.[1]

Practice Tip:

The construction of clauses in mortgages describing the indebtedness in general terms largely rests upon the question of the intent of the parties as to what debts were to be secured, and such intent is determined by the wording of the clause in the light of the surrounding circumstances.[2] In some instances, however, the question of what debts are included has been determined upon a strict construction of the wording of the clause, apparently without reference to the intent of the parties.[3]

Footnotes

[1] Harajli Mgt. & Invest., Inc. v. A&M Invest. Strategies, Inc., 167 Ohio App. 3d 546, 2006-Ohio-3052, 855 N.E.2d 1262 (6th Dist. Lucas County 2006).
Description of property subject to mortgage, see §§ 35 to 48.
A mortgage must clearly refer to the obligation which the realty is to secure. North-East Hospitality L.L.C. v. Batavia Innkeepers, Inc., 262 A.D.2d 1049, 692 N.Y.S.2d 261 (4th Dep't 1999).

[2] Richeson v. National Bank of Mena, 96 Ark. 594, 132 S.W. 913 (1910); Chambers v. Prewitt, 172 Ill. 615, 50 N.E. 145 (1898); Snow v. Pressey, 85 Me. 408, 27 A. 272 (1893); Belton v. Farmers' & Merchants' Bank & Trust Co., 186 N.C. 614, 120 S.E. 220 (1923).

[3] Hendrickson v. Farmers' Bank & Trust Co., 189 Ark. 423, 73 S.W.2d 725 (1934); First v. Byrne, 238 Iowa 712, 28 N.W.2d 509, 172 A.L.R. 1072 (1947) ("dragnet" clause); Exchange Trust Co. v. Hitchcock, 249 Mass. 547, 144 N.E. 373 (1924); McCollum v. Braddock Trust Co., 330 Pa. 293, 198 A. 803 (1938).

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G. Debts, Liabilities, or Obligations Secured

5. Description of Obligations Secured

§ 66. Sufficiency of description of obligations secured by mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

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A mortgage must recite the obligation secured in sufficient detail to identify the nature and amount of the underlying debt with reasonable certainty.[1] While a statute may require that the underlying obligation be described accurately,[2] as between the parties, the general rule is that no exact degree of accuracy is required in the description of the debt secured by a mortgage, since it is sufficient if the debt secured is capable of identification and the amount thereof is ascertainable.[3] Thus, a valid mortgage need not list the exact amount of money to be repaid or how such amount is to be calculated so long as it clearly states that the mortgage was conveyed as security for the payment of money due from one party to the other.[4] Where the obligation is undetermined in extent or amount, the description must necessarily be more or less indefinite, and in view of this consideration, descriptions of a very general character have been pronounced sufficient in such cases.[5]

A description of the obligation purportedly secured by a deed of trust must be sufficient to put subsequent purchasers and creditors on notice of the nature and amount of the obligation secured.[6] As between third parties, while literal accuracy of description is not required, it is essential that the debt be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of a fraud upon creditors.[7] It is not requisite, however, that the description be so completely certain as to preclude the necessity of extraneous inquiry.[8] On the contrary, the general rule has been laid down that a mortgage is not invalid as to third persons on account of uncertainty in the description of the debt intended to be secured where, on the ordinary principle allowing extrinsic evidence to apply a written contract to its subject matter, the debt intended to be secured can be identified.[9] In this connection, the description has been held sufficient where it indicates sources of information by reference to which the exact terms and extent of the encumbrance can be ascertained.[10] Moreover, in the majority of the cases it is held that a recorded mortgage is valid as to third persons, or is sufficient notice of the debt secured thereby, even though there is an omission in the mortgage of the amount of the debt, or only a general description of the debt without a statement as to the amount.[11] It has also been held in some cases, however, that where the amount of a debt is ascertained at the time of the execution of a mortgage, the failure of the mortgage to recite the amount thereof renders the mortgage invalid as to third persons, and is insufficient to constitute notice of the existence of the debt.[12]

Footnotes

[1] U.S. v. Four Parcels of Real Property on Lake Forrest Circle In Riverchase, Shelby County, Ala., 870 F.2d 586 (11th Cir. 1989).

[2] In re B-Bar Tavern Inc., 506 B.R. 879 (Bankr. D. Mont. 2013) (Montana statute).

[3] Utley v. Smith, 24 Conn. 290, 1855 WL 905 (1855); Cabbage v. Citizens Bank & Trust Co., 31 Tenn. App. 283, 214 S.W.2d 572 (1948).
Literal exactness is not required when describing the underlying obligation. In re Lolley, 607 B.R. 673 (Bankr. W.D. Mo. 2019) (under Missouri law).

[4] Harajli Mgt. & Invest., Inc. v. A&M Invest. Strategies, Inc., 167 Ohio App. 3d 546, 2006-Ohio-3052, 855 N.E.2d 1262 (6th Dist. Lucas County 2006).

[5] Cabbage v. Citizens Bank & Trust Co., 31 Tenn. App. 283, 214 S.W.2d 572 (1948).

[6] In re Skumpija, 494 B.R. 822 (Bankr. E.D. N.C. 2013).

[7] New v. Sailors, 114 Ind. 407, 16 N.E. 609 (1888); Unger v. Shull, 1931 OK 741, 154 Okla. 277, 7 P.2d 881 (1931).
Under Illinois law, the debt amount is an indispensable element of a mortgage and must be included in a recording, in at least some way, for the recording to be effective against a third party. In re Crane, 742 F.3d 702 (7th Cir. 2013).

[8] Unger v. Shull, 1931 OK 741, 154 Okla. 277, 7 P.2d 881 (1931); Cabbage v. Citizens Bank & Trust Co., 31 Tenn. App. 283, 214 S.W.2d 572 (1948).

[9] Dart and Bogue Co., Inc. v. Slosberg, 202 Conn. 566, 522 A.2d 763 (1987) (holding that failure to state the maximum term of the obligation secured does not invalidate the mortgage where the mortgage otherwise gives notice of the nature and amount of the obligation so that subsequent lien creditors are not misled); Unger v. Shull, 1931 OK 741, 154 Okla. 277, 7 P.2d 881 (1931); Cabbage v. Citizens Bank & Trust Co., 31 Tenn. App. 283, 214 S.W.2d 572 (1948).

[10] Bowen v. Ratcliff, 140 Ind. 393, 39 N.E. 860 (1895); Unger v. Shull, 1931 OK 741, 154 Okla. 277, 7 P.2d 881 (1931); Holley's Ex'r v. Curry, 58 W. Va. 70, 51 S.E. 135 (1905).
A bank's mortgage that secured an equity line of credit sufficiently described the debt to put a second mortgage company on notice of the debt and direct its attention to the bank as the source of correct information such that the second mortgage company was not entitled to an equitable subrogation to the bank's prior mortgage. Liberty Mortg. Corp., Inc. v. National City Bank, 755 N.E.2d 639 (Ind. Ct. App. 2001).

[11] Tobin v. Kampe, 132 F.2d 64, 145 A.L.R. 366 (C.C.A. 8th Cir. 1942); Gardner v. Cohn, 191 Ill. 553, 61 N.E. 492 (1901) (where the amount could be computed from recitals as to interest payments); Allen v. Stainback, 186 N.C. 75, 118 S.E. 903 (1923).

[12] Sowder v. Lawrence, 129 Kan. 135, 281 P. 921 (1929); People's Bank v. Morgan County Nat. Bank, 266 Ky. 308, 98 S.W.2d 936 (1936); Farmers Nat. Bank of Cherokee v. De Fever, 1936 OK 577, 177 Okla. 561, 61 P.2d 245 (1936).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

5. Description of Obligations Secured

§ 67. Description of future obligations and advances secured by mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 912, 921

An agreement that future advances shall be secured need not be reduced to writing, but may be shown by parol evidence.[1] A similar result has been reached as against owners of interests subsequently acquired,[2] who are not prejudiced by such absence of disclosure.[3] In this connection, it has been declared not to be inequitable to give effect to a mortgage to secure future advances, which does not disclose such purpose on its face, where the mortgage is otherwise fair and where it gives such information that by an inspection of the record and by the exercise of common prudence and ordinary diligence, the extent of the encumbrance may be ascertained.[4]

Practice Tip:

Of course, the omission to state the object subjects the mortgage to suspicion and the mortgagee to strict proof.[5] It has also been held that the mortgage must contain a clear and express provision that it secures future indebtedness in order for it to be given that effect.[6]

The general rule is that it is not essential that a mortgage to secure future advances contain a stipulation that they be made within a specified period.[7] It is sometimes expressly provided by statute, however, that no mortgage to secure future loans or advances shall be valid unless the times when they are to be made shall be specifically stated in the mortgage, but it has been held that the turning over to a trustee of money advanced on a mortgage, to be used in the payment of work as it progresses on buildings to be constructed by the mortgagor, does not make the mortgage one for future advances within the meaning of a

statute making such a mortgage invalid unless it provides how and when the advances are to be made.[8]

It is sometimes expressly provided by statute that no mortgage to secure future loans or advances shall be valid unless the amount or amounts of the same are specifically stated in the mortgage.[9] However, most of the courts agree that a mortgage which on its face shows that it is given to secure future advances need not show the amount which it is intended to secure.[10]

Footnotes

1 Kirby v. Raynes, 138 Ala. 194, 35 So. 118 (1903); Corn Belt Trust & Savings Bank of Belle Plaine v. May, 197 Iowa 54, 196 N.W. 735 (1924).
Mortgage as securing future advances, generally, see §§ 54 to 56.

2 Kentucky Lumber & Mill Work Co. v. Kentucky Title Savings Bank & Trust Co., 184 Ky. 244, 211 S.W. 765, 5 A.L.R. 391 (1919).
There has been declared to be no contravention of registry laws, since the registry is not intended as notice of the amount actually due on a mortgage. Corn Belt Trust & Savings Bank of Belle Plaine v. May, 197 Iowa 54, 196 N.W. 735 (1924).

3 Kirby v. Raynes, 138 Ala. 194, 35 So. 118 (1903); Tapia v. Demartini, 77 Cal. 383, 19 P. 641 (1888); Corn Belt Trust & Savings Bank of Belle Plaine v. May, 197 Iowa 54, 196 N.W. 735 (1924); First Nat. Bank v. Robke, 72 Mont. 527, 235 P. 327 (1925).

4 Bowen v. Ratcliff, 140 Ind. 393, 39 N.E. 860 (1895); Corn Belt Trust & Savings Bank of Belle Plaine v. May, 197 Iowa 54, 196 N.W. 735 (1924); Summers v. Roos, 42 Miss. 749, 1869 WL 2728 (1869); First Nat. Bank v. Robke, 72 Mont. 527, 235 P. 327 (1925).

5 Shirras v. Caig, 11 U.S. 34, 3 L. Ed. 260, 1812 WL 1507 (1812); Corn Belt Trust & Savings Bank of Belle Plaine v. May, 197 Iowa 54, 196 N.W. 735 (1924); First Nat. Bank v. Robke, 72 Mont. 527, 235 P. 327 (1925).

6 First State Bank of Franklin County v. Ford, 484 So. 2d 407 (Ala. 1986).

7 Batten v. Jurist, 306 Pa. 64, 158 A. 557, 81 A.L.R. 625 (1932).

8 Western Nat. Bank v. Jenkins, 131 Md. 239, 101 A. 667, 1 A.L.R. 1577 (1917).

9 In re B-Bar Tavern Inc., 506 B.R. 879 (Bankr. D. Mont. 2013) (under Montana law); Western Nat. Bank v. Jenkins, 131 Md. 239, 101 A. 667, 1 A.L.R. 1577 (1917).

10 Hamilton v. Rhodes, 72 Ark. 625, 83 S.W. 351 (1904); Batten v. Jurist, 306 Pa. 64, 158 A. 557, 81 A.L.R. 625 (1932).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

5. Description of Obligations Secured

§ 68. Proof of obligation intended to be secured by mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 912

Parol evidence is admissible to identify the note intended to be secured by a mortgage or deed of trust.[1] In addition, a covenant in a mortgage to pay the indebtedness recited therein, even in the absence of another document manifesting that debt, is some evidence that such an obligation exists.[2]

Footnotes

1 Harlan County v. Whitney, 65 Neb. 105, 90 N.W. 993 (1902) (if a deed recites that the grantee is trustee for the sureties on the bond of the grantor, parol evidence is admissible to identify the obligation referred to).
Although a declaration by a grantee in an instrument transferring property as security for a debt due a third person, as to what debt the mortgage was intended to cover, is not binding on the parties as a declaration of trust, parol evidence is admissible to show an acquiescence in the declaration by the obligor and obligee. Keese v. Beardsley, 190 Cal. 465, 213 P. 500, 26 A.L.R. 1538 (1923).
Deeds of trust, generally, see §§ 109 to 121.

2 Reliance Ins. Co. v. Brown, 59 A.D.2d 968, 399 N.Y.S.2d 286 (3d Dep't 1977).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

6. Persons Liable

§ 69. Real owner of property as liable on mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 873

The general rule is that a real owner of property incurs no personal liability on a mortgage debt where the legal title to the property is invested in a third person for the purpose of having the latter negotiate the mortgage thereon.[1] This is true when the property is conveyed by the real owner to a third person, who secures a mortgage thereon.[2]

Caution:

A party which signs a mortgage but does not sign the accompanying note cannot be held liable beyond that party's interest in the property.[3]

Footnotes

1 State ex rel. Mesker v. Reynolds, 245 S.W. 1065, 25 A.L.R. 1484 (Mo. 1922).
Parties to a mortgage, generally, see § 11.

2 State ex rel. Mesker v. Reynolds, 245 S.W. 1065, 25 A.L.R. 1484 (Mo. 1922).

[3] Frederick v. Frederick, 257 So. 3d 1105 (Fla. 2d DCA 2018).

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II. Requisites and Validity; Modification

G. Debts, Liabilities, or Obligations Secured

6. Persons Liable

§ 70. Junior mortgagees as liable on mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 873

A junior mortgagee is under no duty to the mortgagor to pay off prior mortgages[1] although the second mortgage recites the existence of the first mortgage and declares that it is taken subject thereto.[2] Indeed, it is held that a stipulation in a mortgage that the mortgagee shall pay a prior mortgage does not render him or her liable to the prior mortgagee.[3] This holding has even been applied in the case of a deed absolute on its face containing an agreement by the grantee to pay off the prior mortgage, where the deed was intended as a mortgage.[4]

It has been held, however, that the promise of a junior mortgagee to make the payments required by the terms of the note secured by the senior mortgage, if the senior mortgagee forbears to foreclose, is supported by legal consideration.[5] It has also been said that the agreement of a mortgagee, entered into as consideration for the mortgage to him or her, to assume or pay a prior mortgage on the premises seems necessarily to be merely an agreement to make a loan;[6] and that the question whether the recital in a mortgage that the mortgagee assumes a prior mortgage binds the mortgagee to advance the apparent or supposed amount of the prior mortgage, or merely such amount as constitutes the sum actually secured thereby, is obviously a question of contractual intent.[7]

Footnotes

1 Wartell v. Novograd, 48 R.I. 296, 137 A. 776, 53 A.L.R. 365 (1927).

2 Martin v. Raleigh State Bank, 146 Miss. 1, 111 So. 448, 51 A.L.R. 442 (1927).

3 Louisville Joint Stock Land Bank v. Kenner, 255 Ky. 44, 72 S.W.2d 751 (1934); Garnsey v. Rogers, 47 N.Y. 233, 1872 WL 9716 (1872).

[4] Louisville Joint Stock Land Bank v. Kenner, 255 Ky. 44, 72 S.W.2d 751 (1934); Garnsey v. Rogers, 47 N.Y. 233, 1872 WL 9716 (1872).

[5] Kahn v. Waldman, 283 Mass. 391, 186 N.E. 587, 88 A.L.R. 699 (1933).

[6] Safford v. Levin, 149 Misc. 384, 266 N.Y.S. 687 (Sup 1932).

[7] Capitol Nat. Bank & Trust Co. v. David B. Roberts, Inc., 129 Conn. 194, 27 A.2d 116, 141 A.L.R. 1179 (1942); Briggs v. Seymour, 17 Wis. 255, 1863 WL 1129 (1863).

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54A Am. Jur. 2d Mortgages III A Refs.

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III. Types of Mortgages; Conveyance as Mortgage

A. In General; Common Forms of Mortgages

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 714, 920, 1042, 1557

A.L.R. Library

A.L.R. Index, Mortgages
West's A.L.R. Digest, Mortgages and Deeds of Trust 714, 920, 1042, 1557

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54A Am. Jur. 2d Mortgages § 71

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III. Types of Mortgages; Conveyance as Mortgage

A. In General; Common Forms of Mortgages

§ 71. Purchase money mortgages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 714

The term, "purchase money mortgage" refers to a security interest that a buyer gives for the unpaid purchase money on a sale of land, as part of the same transaction as the deed, when its funds are actually used to buy the land.[1] A mortgage on land executed to secure the purchase money by a purchaser of the land contemporaneously with the acquisition of the legal title thereto, or afterward, but as a part of the same transaction, is a purchase money mortgage.[2] While a purchase money mortgage must be granted as a part of one continuous transaction involving the purchase, the execution of the mortgage and the transfer of the deed need not be strictly contemporaneous.[3] The deed and mortgage need not be executed at the same moment, or even on the same day, to make them contemporaneous within the meaning of this rule, provided they are parts of one continuous transaction and so intended to be.[4] A mortgage given to secure money to be applied on the purchase price of land, although given after the execution of a deed of the property mortgaged, the mortgagee paying the money to a third person with whom the deed had been deposited in escrow until the payment of the purchase price, and securing the deed and delivering it to the mortgagor, is nevertheless a purchase money mortgage.[5] Moreover, the fact that a mortgage is made to a person other than the vendor does not prevent its being a purchase money mortgage.[6]

Observation:

A purchase money mortgage is different from a refinancing in that the proceeds advanced by the lender are used to purchase the mortgaged property.[7]

Footnotes

[1] Mutual of Omaha Bank v. Watson, 297 Neb. 479, 900 N.W.2d 545 (2017).

[2] U.S. v. New Orleans & O.R. Co., 79 U.S. 362, 20 L. Ed. 434, 1870 WL 12757 (1870); Martin v. First Nat. Bank of Opelika, 279 Ala. 303, 184 So. 2d 815 (1966); Ely Sav. Bank v. Graham, 201 Iowa 840, 208 N.W. 312 (1926); Emporia Wholesale Coffee Co. v. Rehrig, 173 Kan. 841, 252 P.2d 590 (1953); 10 East Realty, LLC v. Incorporated Village of Valley Stream, 12 N.Y.3d 212, 879 N.Y.S.2d 361, 907 N.E.2d 274 (2009); Ladd & Tilton Bank v. Mitchell, 93 Or. 668, 184 P. 282, 6 A.L.R. 1420 (1919); Powers v. Pense, 20 Wyo. 327, 123 P. 925 (1912).
If a mortgage or deed of trust is given to secure the payment of purchase money, it has the status of a purchase money mortgage. Thompson v. Litwood Oil & Supply Co., 287 S.W. 279 (Tex. Civ. App. Waco 1926).

[3] Insight LLC v. Gunter, 154 Idaho 779, 302 P.3d 1052 (2013).

[4] Faulkner County Bank & Trust Co. v. Vail, 173 Ark. 406, 293 S.W. 40 (1927); Emery v. Ward, 68 Colo. 373, 191 P. 99 (1920); Emporia Wholesale Coffee Co. v. Rehrig, 173 Kan. 841, 252 P.2d 590 (1953); Slattengren & Sons Properties, LLC v. RTS River Bluff, LLC, 805 N.W.2d 279 (Minn. Ct. App. 2011); Homeside Lending, Inc. v. Miller, 2001 UT App 247, 31 P.3d 607 (Utah Ct. App. 2001); Goodman v. Riddick, 152 Va. 693, 148 S.E. 695 (1929).

[5] Birmingham Building & Loan Ass'n v. Boggs, 116 Ala. 587, 22 So. 852 (1897); Ely Sav. Bank v. Graham, 201 Iowa 840, 208 N.W. 312 (1926).

[6] Martin v. First Nat. Bank of Opelika, 279 Ala. 303, 184 So. 2d 815 (1966); Faulkner County Bank & Trust Co. v. Vail, 173 Ark. 406, 293 S.W. 40 (1927); Goodman v. Riddick, 152 Va. 693, 148 S.E. 695 (1929).
Where the former Federal Home Owners' Loan Corporation furnished a purchaser the money paid by him to his vendor to enable him to acquire title to real estate, and to secure the same, the purchaser executed and delivered to the corporation a mortgage on the real estate, such mortgage was regarded as a purchase money mortgage. Home Owners' Loan Corporation v. Humphrey, 148 Kan. 779, 85 P.2d 7 (1938).

[7] Wells Fargo Bank, Minnesota, N.A. v. Com., Finance and Admin., Dept. of Revenue, 345 S.W.3d 800 (Ky. 2011), as corrected, (Aug. 25, 2011).

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III. Types of Mortgages; Conveyance as Mortgage

A. In General; Common Forms of Mortgages

§ 72. Construction mortgages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 1042

A.L.R. Library

Mortgagee-lender's duty, in disbursing funds to, protect mortgagor against outstanding or potential mechanics' liens against the mortgaged property, 30 A.L.R.4th 134

Forms

Am. Jur. Legal Forms 2d § 179:238 (Mortgage, security agreement, assignment of leases and rents and fixture financing statement—Securing construction loan—Manufacturing plant)
Am. Jur. Legal Forms 2d § 179:239 (Trust deed—Securing construction loan)

A construction mortgage may be defined as one obtained for the purpose of financing construction, under which the mortgagee is empowered and obligated to disburse the funds to the builder or contractor as the construction progresses.[1] Such a mortgage is thus one to secure future advances,[2] although a construction mortgage may have distinctive features in that the mortgagee may become liable in tort to the mortgagor if reasonable care is not exercised in disbursing the funds to protect the mortgagor from mechanics' liens filed against the property.[3] The mortgagee, however, must have undertaken the responsibility by agreeing to disburse the loan proceeds directly to third parties.[4] In addition, the mortgagee may be held liable to the mortgagor if the mortgagee assumes the responsibility or the right to distribute the loan proceeds to parties other than the mortgagor during the course of construction; the mortgagee is apprised by the mortgagor of substantial deficiencies

in construction that affect the structural integrity of the building; the mortgagor requests that the mortgagee withhold further distributions of loan proceeds pending the satisfactory resolution of the construction deficiency; the mortgagee continues to distribute loan proceeds in complete disregard of the mortgagor's complaints and without any bona fide attempt to ascertain the truth of the complaints; and the mortgagor ultimately is damaged because the substance of the mortgagor's complaints was accurate and the mortgagor is unable to recover damages against the contractor or other party directly responsible for the construction deficiencies.[5] The mortgagee, however, normally has no duty to inspect the construction it has financed.[6]

Footnotes

1 Lamar v. Nylen, 240 Md. 740, 215 A.2d 806 (1966) (deed of trust); Larson Cement Stone Co. v. Redlim Realty Co., 179 Neb. 134, 137 N.W.2d 241 (1965); Falls Lumber Co. v. Heman, 114 Ohio App. 262, 19 Ohio Op. 2d 165, 181 N.E.2d 713 (9th Dist. Summit County 1961); Elmendorf-Anthony Co. v. Dunn, 10 Wash. 2d 29, 116 P.2d 253, 138 A.L.R. 558 (1941).

2 Drake Lumber Co. v. Paget Mortg. Co., 203 Or. 66, 274 P.2d 804 (1954) (a construction mortgage is one given to secure future advances made from time to time in aid of the construction of an improvement).
Future advances, generally, see §§ 54 to 56.

3 Falls Lumber Co. v. Heman, 114 Ohio App. 262, 19 Ohio Op. 2d 165, 181 N.E.2d 713 (9th Dist. Summit County 1961).

4 Woodall v. Citizens Banking Co., 507 N.E.2d 999 (Ind. Ct. App. 1987), holding that mortgagor-defendants in a mechanic's lien foreclosure suit would not be entitled to protection from the mortgagee-lender in the absence of an express agreement providing for such protection, or community custom or practice, or an agency relationship between the mortgagor and the mortgagee in which the mortgagee controlled disbursements.

5 Davis v. Nevada Nat. Bank, 103 Nev. 220, 737 P.2d 503 (1987).

6 Armetta v. Clevetrust Realty Investors, 359 So. 2d 540 (Fla. 4th DCA 1978); Davis v. Nevada Nat. Bank, 103 Nev. 220, 737 P.2d 503 (1987).

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III. Types of Mortgages; Conveyance as Mortgage

A. In General; Common Forms of Mortgages

§ 73. Wraparound mortgages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 920, 1557

A.L.R. Library

Validity and effect of "wraparound" mortgages whereby purchaser incorporates into agreed payments to grantor latter's obligation on initial mortgage, 36 A.L.R.4th 144

Forms

Am. Jur. Legal Forms 2d §§ 179:234, 179:235, 179:274 (Wraparound mortgages)

A wraparound mortgage is a method of financing whereby a new mortgage to cover a new loan is placed in a secondary position to an existing mortgage in the original loan; the entire loan is treated as a single obligation.[1] The principal defining characteristic of a wraparound mortgage is the wrapping of the existing debt owed by the seller to a prior seller or lending institution, which occurs when the new buyer obligates herself or himself to the seller, who in turn remains obligated to pay the existing mortgage debt.[2]

Observation:

The wraparound mortgage (or deed of trust) is a form of secondary financing typically used on older properties having first mortgages with low interest rates in which a lender assumes the developer's first mortgage obligation and also loans additional money, taking back from the developer a junior mortgage in total amount at an intermediate interest rate.[3]

Although there is authority to the contrary,[4] a sale by means of a wraparound mortgage has been held not to violate various provisions of the prior mortgage.[5]

Upon default by the wraparound mortgagor, the wraparound mortgagee can foreclose for the entire amount due under the wraparound mortgage, including the amount due under the prior mortgage.[6] Where the wraparound mortgagee defaults in payments to the prior mortgagee, however, the wraparound mortgagor can recover against the wraparound mortgagee for breach of the covenant to pay the prior lien.[7]

In determining the proper valuation of the wraparound mortgage for purposes of assessing conveyance or document taxes, some jurisdictions have held that the value of the prior mortgage should be deducted from the face amount of the wraparound mortgage,[8] while others have ruled that the entire face amount of the wraparound mortgage is used, including the obligation on the prior mortgage.[9]

Footnotes

1 50 Overlook Associates v. Finance Administration, 72 A.D.2d 131, 423 N.Y.S.2d 659 (1st Dep't 1980).

2 JP Morgan Chase Bank, NA v. Wright, 2015 UT App 301, 365 P.3d 708 (Utah Ct. App. 2015).

3 Prince George's County v. McMahon, 59 Md. App. 682, 477 A.2d 1218 (1984).

4 Mills v. Nashua Federal Sav. and Loan Ass'n, 121 N.H. 722, 433 A.2d 1312 (1981), in which the court held that a conveyance whereby the first mortgagor accepted a wraparound mortgage from the buyers was a "sale or transfer" within the meaning of the due-on-sale clause, but did not consider whether the wraparound mortgage constituted "the creation of a lien or encumbrance subordinate to this mortgage" as contemplated by an exclusionary provision contained in the due-on-sale clause.

5 Consolidated Capital Properties, II, Ltd. v. National Bank of North America, 420 So. 2d 618 (Fla. 5th DCA 1982) (there was insufficient evidence that the first mortgagee's security was impaired); Daugharthy v. Monritt Associates, 293 Md. 399, 444 A.2d 1030, 36 A.L.R.4th 136 (1982) (the court stated that it would not imply that the buyer assumed the debt embodied in the preexisting trust deed so as to invoke the operation of a clause in such preexisting trust deed which permitted the noteholders, upon assumption, to charge the buyer with the interest rate prevailing at the time of assumption).

6 Bayshore Garden Apartments, Ltd. v. Real Estate Apartments, Ltd., 541 So. 2d 158 (Fla. 2d DCA 1989); J. M. Realty Inv. Corp. v. Stern, 296 So. 2d 588 (Fla. 3d DCA 1974) (criticized on the grounds there are different ways to calculate the amount owed under a wraparound mortgage in).

7 Newsom v. Starkey, 541 S.W.2d 468 (Tex. Civ. App. Dallas 1976), writ refused n.r.e., (Dec. 22, 1976).

8 Department of Revenue v. Brookwood Associates, Ltd., 324 So. 2d 184 (Fla. 1st DCA 1975); Prince George's County v. McMahon, 59 Md. App. 682, 477 A.2d 1218 (1984); First Fiscal Fund Corp. v. State Tax Commission, 49 A.D.2d 408, 375 N.Y.S.2d 433 (3d Dep't 1975), judgment aff'd, 40 N.Y.2d 940, 390 N.Y.S.2d 412, 358 N.E.2d 1037 (1976).

9 State Dept. of Revenue v. McCoy Motel, Inc., 302 So. 2d 440 (Fla. 1st DCA 1974); 50 Overlook Associates v. Finance Administration, 72 A.D.2d 131, 423 N.Y.S.2d 659 (1st Dep't 1980).

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54A Am. Jur. 2d Mortgages III B Refs.

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III. Types of Mortgages; Conveyance as Mortgage

B. Equitable Mortgages

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 821, 822, 832, 834, 893

A.L.R. Library

A.L.R. Index, Mortgages
West's A.L.R. Digest, Mortgages and Deeds of Trust 821, 822, 832, 834, 893

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III. Types of Mortgages; Conveyance as Mortgage

B. Equitable Mortgages

§ 74. Equitable mortgages, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 821, 822, 832, 893

Trial Strategy

Proof That Grantor Intended Deed as Mortgage, 79 Am. Jur. Proof of Facts 3d 109

There are a number of situations wherein instruments which are not effective as mortgages at law will be regarded as such under equitable principles,[1] and thus will be considered as binding on the parties as though mortgages in due form had been properly executed.[2] Such instruments are known as equitable mortgages.[3] An equitable mortgage is appropriate in circumstances where the underlying mortgage is void, particularly when one party received the benefits of the mortgage.[4] This rule is derived from the maxim that "equity regards as done that which has been agreed to be, and ought to have been done."[5] Thus, when a mortgage is invalid by reason of a technical defect, equity will give effect to the intent of the parties according to the substance of the transaction.[6] In proper cases, equity will also protect one lending money secured by a mortgage to pay an existing valid lien.[7] Additionally, an equitable mortgage may be created when real property is conveyed together with an option to repurchase the property, where the intention of the parties at the time of the transaction was to secure a debt.[8] A contract for a deed is also a form of equitable mortgage, because the mortgagee and mortgagor have not taken the steps to turn the arrangement into a mortgage recognized at law—creating deeds to be exchanged and filing them in the land records.[9] Finally, the mistaken release of a recorded deed of trust creates an equitable lien in favor of the creditor.[10]

An equitable mortgage can be implied when parties to a loan transaction intend that there be security for the loan[11] whatever may be its form or name;[12] an equitable mortgage places the substance of the parties' intent over form.[13] Thus, an equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity.[14] It has been held that specifically, the elements of an equitable mortgage are (1) the mortgagor has a mortgageable interest in the property sought to be charged as security;

(2) clear proof of the sum which it was to secure; (3) a definite debt, obligation or liability to be secured, due from the mortgagor to the mortgagee; and (4) the intent of the parties to create a mortgage, lien or charge on the property sufficiently described or identified to secure the obligation.[15]

The general rule is that an instrument cannot operate as an equitable mortgage if it merely assumes that a lien has been or will be created; it must purport through its own terms and efficiency to create the lien.[16] Moreover, while an instrument which is intended to be a mortgage and fails as a legal mortgage because of some defect or infirmity in its execution may be recognized as an equitable mortgage, such is held not to be the case where the instrument was executed by an attorney in fact pursuant to a power that was unacknowledged.[17]

When an equitable mortgage exists, nothing short of the actual payment of the debt, or an express release will operate as a discharge of the mortgage; this right cannot be restrained or barred except by methods prescribed in law.[18]

Footnotes

1 Ober v. Gallagher, 93 U.S. 199, 23 L. Ed. 829, 1876 WL 19670 (1876); Union Planters Bank, N.A. v. People of State of New York, 988 So. 2d 1007 (Ala. 2008) (mortgage invalid due to a technical defect); Trustees of Zion Methodist Church v. Smith, 335 Ill. App. 233, 81 N.E.2d 649 (4th Dist. 1948) (note held to constitute equitable mortgage); Parry v. Reinertson, 208 Iowa 739, 224 N.W. 489, 63 A.L.R. 1051 (1929); Sayers & Scovill Co. v. Doak, 127 Miss. 216, 89 So. 917 (1921); Flyge v. Flynn, 63 Nev. 201, 166 P.2d 539 (1946); Gould v. McKillip, 55 Wyo. 251, 99 P.2d 67, 129 A.L.R. 1427 (1940).

2 Trustees of Zion Methodist Church v. Smith, 335 Ill. App. 233, 81 N.E.2d 649 (4th Dist. 1948); Flyge v. Flynn, 63 Nev. 201, 166 P.2d 539 (1946).

3 Ober v. Gallagher, 93 U.S. 199, 23 L. Ed. 829, 1876 WL 19670 (1876); Pollak v. Millsap, 219 Ala. 273, 122 So. 16, 65 A.L.R. 110 (1928); Trustees of Zion Methodist Church v. Smith, 335 Ill. App. 233, 81 N.E.2d 649 (4th Dist. 1948); Parry v. Reinertson, 208 Iowa 739, 224 N.W. 489, 63 A.L.R. 1051 (1929); Flyge v. Flynn, 63 Nev. 201, 166 P.2d 539 (1946).

4 In re Sutter, 665 F.3d 722 (6th Cir. 2012) (under Michigan law).

5 In re Bridge, 18 F.3d 195 (3d Cir. 1994); Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 80 P. 49 (1905); Sayers & Scovill Co. v. Doak, 127 Miss. 216, 89 So. 917 (1921); Green Tree Acceptance, Inc. v. Anderson, 1999 OK CIV APP 46, 981 P.2d 804 (Div. 1 1999); Fleishbein v. Thorne, 193 Wash. 65, 74 P.2d 880 (1937).

6 Union Planters Bank, N.A. v. People of State of New York, 988 So. 2d 1007 (Ala. 2008).

7 National City Mortg. Co. v. Ross, 34 Kan. App. 2d 282, 117 P.3d 880 (2005).
A financial services company was entitled to an equitable lien against a property, where the company's funds were used to satisfy the first mortgage and property tax lien on such property, which were debts that would otherwise have had to be paid; any other holding would have granted the second mortgagees a windfall to which they were not entitled. First NLC Financial Services, LLC v. Altamirano, 847 So. 2d 516 (Fla. 3d DCA 2003).

8 Tomika Investments, Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc., 136 N.C. App. 493, 524 S.E.2d 591 (2000).
Conveyances as equitable mortgages, generally, see §§ 76 to 108.

9 Kellogg v. Shushereba, 194 Vt. 446, 2013 VT 76, 82 A.3d 1121 (2013).

10 Holiday Hospitality Franchising, Inc. v. States Resources, Inc., 232 S.W.3d 41 (Tenn. Ct. App. 2006).
Deeds of trust, generally, see §§ 109 to 121.

11 First Const. Credit, Inc. v. Simonson Lumber of Waite Park, Inc., 663 N.W.2d 14 (Minn. Ct. App. 2003); Village of Philadelphia v. FortisUS Energy Corp., 48 A.D.3d 1193, 851 N.Y.S.2d 780 (4th Dep't 2008).
An equitable lien on real property is created when a property owner creates a written agreement that sufficiently

indicates an intention to make his property, as described in the agreement, a security for a debt or other obligation. U.S. v. Tully, 288 F.3d 982 (7th Cir. 2002).

12 Kissinger v. Genetic Evaluation Center, Inc., 260 Neb. 431, 618 N.W.2d 429 (2000).

13 Burkhardt v. Bailey, 260 Mich. App. 636, 680 N.W.2d 453 (2004).

14 Capital One, N.A. v. Karp, 56 Misc. 3d 1054, 59 N.Y.S.3d 276 (Sup 2017).

15 Union Planters Bank, N.A. v. New York, 436 F.3d 1305 (11th Cir. 2006); Union Planters Bank, N.A. v. People of State of New York, 988 So. 2d 1007 (Ala. 2008).

16 Bell v. Pelt, 51 Ark. 433, 11 S.W. 684 (1889); Trustees of Zion Methodist Church v. Smith, 335 Ill. App. 233, 81 N.E.2d 649 (4th Dist. 1948) (recognizing principle).
Intent to create an equitable mortgage cannot be inferred from the mere fact of a down payment by a lessee who has a right of repurchase. Sunwest Bank of Clovis, N.A. v. Clovis IV, 1987-NMSC-065, 106 N.M. 149, 740 P.2d 699 (1987).

17 Lubin v. Klein, 232 Md. 369, 193 A.2d 46 (1963).

18 Myers v. Eich, 2006 SD 69, 720 N.W.2d 76 (S.D. 2006).

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III. Types of Mortgages; Conveyance as Mortgage

B. Equitable Mortgages

§ 75. Agreement to mortgage as equitable mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 832, 834

An agreement to secure an obligation by a mortgage is generally regarded as operating as an equitable mortgage.[1] This is true where real estate is acquired with money loaned for the purchase, under a promise that the lender is to receive a mortgage,[2] especially where the lender is given the undelivered deed to hold as security for the performance of the obligation.[3]

Footnotes

1 Farmers' State Bank of Cunningham v. St. Aubyn, 120 Kan. 66, 242 P. 466 (1926); Fleishbein v. Thorne, 193 Wash. 65, 74 P.2d 880 (1937); American Sav. Bank & Trust Co. v. Lawrence, 114 Wash. 198, 194 P. 971 (1921).
An agreement or contract to charge described property as security for money advanced creates an equitable lien in the nature of the mortgage. Grayson v. Crawford, 1941 OK 349, 189 Okla. 546, 119 P.2d 42 (1941).

2 Reed v. Dyal, 397 So. 2d 389 (Fla. 1st DCA 1981) (impressing an equitable lien or mortgage on the defendants' property where the plaintiffs had advanced a certain sum to the defendants upon the condition that the defendants would execute and deliver a mortgage on the property and the defendants had failed to do so; having failed to repay any part of the sums advanced, the defendants could not assert as a defense any lack of specificity in the transaction); Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 80 P. 49 (1905); Leary v. Corvin, 181 N.Y. 222, 73 N.E. 984 (1905).

3 Valley State Bank v. Dean, 97 Colo. 151, 47 P.2d 924 (1935); Warren Mortgage Co. v. Winters, 94 Kan. 615, 146 P. 1012 (1915).

54A Am. Jur. 2d Mortgages III C Refs.

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III. Types of Mortgages; Conveyance as Mortgage

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Research References

West's Key Number Digest

West's Key Number Digest, Equity 84

West's Key Number Digest, Evidence 441(8)
West's Key Number Digest, Limitation of Actions 170
West's Key Number Digest, Mortgages and Deeds of Trust 821 to 838, 892

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

1. In General

§ 76. Construing absolute deed or other conveyance as mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 826 to 829

Trial Strategy

Proof That Grantor Intended Deed as Mortgage, 79 Am. Jur. Proof of Facts 3d 109

The substance and not the form is what is critical in deciding whether or not a conveyance is a mortgage.[1] A deed conveying real property, although absolute on its face, will be considered to be a mortgage when the instrument is executed as security for a debt;[2] in order for a court to convert a deed that is absolute on its face into a mortgage, it is essential for a mortgage that there be a debt relationship.[3] The interpretation of an instrument as a mortgage, or otherwise, presents a question to be decided from a consideration of the whole transaction, and not from any particular feature of it.[4] However, the characterization of the transaction by the parties in the instrument is not conclusive.[5] Moreover, the character of the transaction is fixed at its inception.[6]

Footnotes

1 Blanco v. Novoa, 854 So. 2d 672 (Fla. 3d DCA 2003).

2 Levenson v. Feuer, 60 Mass. App. Ct. 428, 803 N.E.2d 341 (2004); Bouffard v. Befese, LLC, 111 A.D.3d 866, 976 N.Y.S.2d 510 (2d Dep't 2013).

[3] Nave v. Heinzmann, 344 Ill. App. 3d 815, 279 Ill. Dec. 829, 801 N.E.2d 121 (5th Dist. 2003).

[4] Ebbs v. Neff, 325 Mo. 1182, 30 S.W.2d 616 (1930); Matter of Estate of Casebeer, 297 Or. App. 258, 443 P.3d 718 (2019); Cliff & Co., Ltd. v. Anderson, 777 P.2d 595 (Wyo. 1989).

[5] Steckelberg v. Randolph, 404 N.W.2d 144 (Iowa 1987); Sweet v. Luster, 513 So. 2d 1240 (Miss. 1987) (holding that parol evidence was admissible to prove the transaction was intended as a mortgage and not an absolute conveyance where the grantor retained possession of the property); Smith v. Headlee, 93 Or. 257, 183 P. 20 (1919).

[6] Peugh v. Davis, 96 U.S. 332, 24 L. Ed. 775, 1877 WL 18507 (1877); Woznicki v. Musick, 119 P.3d 567 (Colo. App. 2005) (overruled on other grounds by, Trattler v. Citron, 182 P.3d 674 (Colo. 2008)); Totten v. Totten, 294 Ill. 70, 128 N.E. 295 (1920); Home Owners' Loan Corporation v. Dalton, 148 Kan. 580, 83 P.2d 624 (1938); Campbell v. Campbell, 223 Mont. 124, 725 P.2d 207 (1986); Myers v. Eich, 2006 SD 69, 720 N.W.2d 76 (S.D. 2006).
When determining whether transaction constitutes equitable mortgage, court focuses on characteristics of transaction at its inception. Zaman v. Felton, 219 N.J. 199, 98 A.3d 503 (2014).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

1. In General

§ 77. Intention of parties as distinguishing mortgage from absolute conveyance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 822

The determinative factor or question in distinguishing a mortgage from an absolute conveyance is the intent of the parties.[1] If a deed or contract is used for the purpose of pledging real property, as security for a debt or obligation, and with the intention that it shall have effect as a mortgage, equity will give effect to the intention of the parties; such is an equitable mortgage.[2] In other words, a purported absolute conveyance may be recharacterized as a mortgage, depending on the parties' intent.[3] Equitable mortgages are generally found when what appears to be an absolute conveyance on its face was actually intended as a mortgage.[4] The availability of an equitable mortgage is not dependent upon the nature of the error, but rather upon the existence of a clear intent between the parties that certain property be held, given, or transferred as security for an obligation.[5]

Observation:

A court is required to consider the understanding and intention of both parties to the transaction, grantees as well as grantors.[6]

More specifically, a deed absolute on its face may be found valid and effectual as a mortgage, if it were intended by the parties to operate as a security for the repayment of money;[7] the relevant intention is that of the parties at the time of conveyance.[8]

Footnotes

1 In re Cox, 493 F.3d 1336 (11th Cir. 2007) (applying Georgia law); Woznicki v. Musick, 119 P.3d 567 (Colo. App. 2005) (overruled on other grounds by, Trattler v. Citron, 182 P.3d 674 (Colo. 2008)); Blanco v. Novoa, 854 So. 2d 672 (Fla. 3d DCA 2003).

2 Reibman v. Myers, 451 N.J. Super. 32, 164 A.3d 1080 (App. Div. 2017).

3 Myers v. Eich, 2006 SD 69, 720 N.W.2d 76 (S.D. 2006).

4 Burkhardt v. Bailey, 260 Mich. App. 636, 680 N.W.2d 453 (2004).

5 Canandaigua Nat. Bank and Trust Co. v. Palmer, 119 A.D.3d 1422, 990 N.Y.S.2d 747 (4th Dep't 2014).

6 Hogg v. Wolske, 142 Idaho 549, 130 P.3d 1087 (2006).

7 Henslee v. Ratliff, 66 Ark. App. 109, 989 S.W.2d 161 (1999); Stinson v. Hall, 938 So. 2d 887 (Miss. Ct. App. 2006); Wintroub v. Nationstar Mortgage LLC, 303 Neb. 15, 927 N.W.2d 19 (2019).
A deed absolute in form will be treated as a conveyance unless both parties in fact intended a loan transaction with the deed as security only. Fraser v. Fraser, 702 N.W.2d 283 (Minn. Ct. App. 2005).

8 Fraser v. Fraser, 702 N.W.2d 283 (Minn. Ct. App. 2005); Reibman v. Myers, 451 N.J. Super. 32, 164 A.3d 1080 (App. Div. 2017).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

1. In General

§ 78. Effect of manifestation of purpose on character of instrument as mortgage or conveyance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 827

To establish that a deed was meant as security and therefore should be considered a mortgage, examination may be made of the deed and a written agreement executed at the same time.[1] A deed that contains or is accompanied by an agreement that it shall be canceled upon payment of a debt is a mortgage.[2] It has also been held that the question of whether a deed absolute on its face, when construed together with a separate agreement, amounts to a mortgage depends on the intention of the parties in light of all attendant circumstances.[3]

Observation:

In determining whether a deed to property is intended only as security, the chief rule of construction is the pronounced preference for gleaning the parties' intent, whenever possible, from written agreements rather than from self-serving testimony.[4]

Footnotes

[1] Henley v. Foreclosure Sales, Inc., 39 A.D.3d 470, 835 N.Y.S.2d 599 (2d Dep't 2007); BMBT, LLC v. Miller, 2014 UT App 64, 322 P.3d 1172 (Utah Ct. App. 2014).

[2] Bank of America, N.A. v. Prestance Corp., 160 Wash. 2d 560, 160 P.3d 17 (2007).

[3] Henslee v. Ratliff, 66 Ark. App. 109, 989 S.W.2d 161 (1999).

[4] Glauser Storage, L.L.C. v. Smedley, 2001 UT App 141, 27 P.3d 565 (Utah Ct. App. 2001).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

1. In General

§ 79. Effect of lack of identity between grantor and obligor on character of instrument as mortgage or conveyance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 826, 829, 892

An instrument of conveyance intended to secure the performance of an obligation, although not in the form of a mortgage, may be interpreted as constituting the obligor a mortgagor even though the obligor is not a party to the conveyance, where, at the time thereof, he or she had a mortgageable interest in the property or, by virtue thereof, acquired such interest and by his or her act or assent procured the execution of the conveyance to the grantee therein.[1] Thus, where one who has a contract for a conveyance of land procures the execution of the deed to another as security for a debt, the transaction constitutes a mortgage.[2]

Footnotes

1 Hubbard v. Cheney, 76 Kan. 222, 91 P. 793 (1907); Jackson v. Maxwell, 113 Me. 366, 94 A. 116 (1915) (holding, notwithstanding the rule stated, that the evidence in the particular case was insufficient to show that the deed was in fact a mortgage); Ascension v. Saenz, 349 S.W.2d 266 (Tex. Civ. App. San Antonio 1961).
A mortgage relationship was created when a possessor executed an absolute deed as security for a loan for a friend to obtain money on the possessor's behalf, and thus the friend's title was subject to the possessor's right to redeem prior to the sale. Anderson v. Kimbrough, 741 So. 2d 1041 (Miss. Ct. App. 1999).

2 Glass v. Hieronymus, 125 Ala. 140, 28 So. 71 (1900); Henry v. Britt, 265 Ill. 131, 106 N.E. 455 (1914) (holding that where a vendee assigned his contract as security for payments to be made thereon by the assignee, who thereafter completed the payments and took a deed from the vendor, a suit by the vendee to enforce specific performance against the assignee's heirs does not involve a freehold, and hence an appeal in such suit should be taken to the appellate court); Ascension v. Saenz, 349 S.W.2d 266 (Tex. Civ. App. San Antonio 1961).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

a. In General

§ 80. Action to determine conveyance as mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Mortgages and Deeds of Trust 821

The question as to the character of a conveyance as a mortgage or otherwise may arise in various kinds of actions, or in actions brought for various purposes.[1]

It has been held that estoppel by deed has no application in an action to declare a deed a mortgage.[2] It has also been held error for the court to allow attorney's fees in an action to have a deed absolute on its face declared a mortgage, where the contract between the parties does not provide for attorney's fees.[3]

Footnotes

1 Head v. Lawrence, 240 Or. 572, 403 P.2d 17 (1965) (an action by a real estate broker for a commission on an alleged sale, in which the defendants contended that the deed relied on by the plaintiff was in fact a mortgage); Glauser Storage, L.L.C. v. Smedley, 2001 UT App 141, 27 P.3d 565 (Utah Ct. App. 2001) (quiet title action).

2 Kohler v. Gilbert, 216 Or. 483, 339 P.2d 1102 (1959).

3 Beindorf v. Thorpe, 1927 OK 2, 126 Okla. 157, 259 P. 242, 55 A.L.R. 1014 (1927).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

a. In General

§ 81. Laches in action to determine conveyance as mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Equity 84

Since it is only by the intervention of equity that a deed absolute on its face may be declared a mortgage, equitable principles as to laches and stale demands are applicable to a suit to secure such relief.[1] There is, however, no fixed rule by which to determine when there is laches sufficient to constitute a defense.[2] Each case is determined according to its own peculiar circumstances.[3] Although a mere delay short of the period established by the statute of limitations does not of itself raise a presumption of laches, it has been held that relief may be refused in the case of a stale demand independent of the period fixed by the statute of limitations, and this is particularly true where the relations of the parties have been altered in the meantime.[4] The rule under which relief is denied is sometimes based on considerations of public policy and the difficulty of doing justice between the parties.[5] On the other hand, there is authority for the rule that the right to have a deed declared a mortgage is not lost by any lapse of time not sufficient to bar it by the statute.[6]

Footnotes

1 Deadman v. Yantis, 230 Ill. 243, 82 N.E. 592 (1907); Mahaffy v. Faris, 144 Iowa 220, 122 N.W. 934 (1909); Alcorn v. Superior Oil Corp., 245 Ky. 343, 53 S.W.2d 528 (1932); Reid v. Dowd, 257 Mich. 492, 241 N.W. 174 (1932); Elling v. Fine, 53 Mont. 481, 164 P. 891 (1917).

2 Mahaffy v. Faris, 144 Iowa 220, 122 N.W. 934 (1909); Elling v. Fine, 53 Mont. 481, 164 P. 891 (1917).

3 Mahaffy v. Faris, 144 Iowa 220, 122 N.W. 934 (1909); Elling v. Fine, 53 Mont. 481, 164 P. 891 (1917).

[4] Mahaffy v. Faris, 144 Iowa 220, 122 N.W. 934 (1909); Elling v. Fine, 53 Mont. 481, 164 P. 891 (1917).

[5] Mahaffy v. Faris, 144 Iowa 220, 122 N.W. 934 (1909); Elling v. Fine, 53 Mont. 481, 164 P. 891 (1917).

[6] Anding v. Davis, 38 Miss. 574, 1860 WL 4825 (1860); Leland v. Morrison, 92 S.C. 501, 75 S.E. 889 (1912).
In this connection, it has been held that courts of equity, while not bound by them, usually act or refuse to act on the basis of provisions in statutes of limitation relating to actions at law of like character. Grable v. Nunez, 64 So. 2d 154 (Fla. 1953) (in which the court applied the statute of limitations as a complete bar to a cross-complaint as being laches).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

a. In General

§ 82. Statute of limitations in action to determine conveyance as mortgage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Limitation of Actions 170

The statute of limitations applies to the right to have an absolute deed declared a mortgage.[1] Under this rule, if the right of the grantee to extinguish the equity of redemption by foreclosure is barred by limitations, the right of the grantor to have the deed declared a mortgage is likewise barred.[2]

As to the effect of the expiration of the statutory period relative to the debt secured, it has been held in some cases that an action to have a deed absolute on its face declared a mortgage is barred when the statute of limitations has run against the debt which the deed was given to secure.[3] There is, however, also authority for the rule that a grantor in possession might defend his or her possession as against the grantee on the ground that the deed was given for security although an action on the debt was barred.[4]

A grantor's right to have a deed absolute on its face declared a mortgage is barred where the grantee enters thereunder and maintains a possession hostile to the grantor for the period sufficient to acquire title by prescription.[5]

This rule does not apply, however, where there is a recognition of the rights of the grantor, as where the grantee agrees to apply rents on the debt which the deed is given to secure.[6]

Footnotes

[1] Green v. Capps, 142 Ill. 286, 31 N.E. 597 (1892).

[2] Allen v. Allen, 95 Cal. 184, 30 P. 213 (1892); Grable v. Nunez, 64 So. 2d 154 (Fla. 1953); Mahaffy v. Faris, 144 Iowa 220, 122 N.W. 934 (1909).

[3] Allen v. Allen, 95 Cal. 184, 30 P. 213 (1892); Pratt v. Pratt, 121 Wash. 298, 209 P. 535, 28 A.L.R. 548 (1922).

[4] Sturdivant v. McCorley, 83 Ark. 278, 103 S.W. 732 (1907).

[5] Richter v. Noll, 128 Ala. 198, 30 So. 740 (1901); Minick v. Reichenbach, 97 Neb. 629, 150 N.W. 1001 (1915).

[6] Caro v. Wollenberg, 68 Or. 420, 136 P. 866 (1913).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

b. Proof

(1) In General

§ 83. Proof of intention that absolute conveyance should operate as mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

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The mutual intention of the parties to an instrument which is absolute on its face, that such instrument should operate as a mortgage, must be shown by direct evidence or by the circumstances of the case.[1] Thus, circumstantial evidence is admissible for the purpose of showing the mortgage quality of an absolute deed.[2] Also, the admissibility of direct testimony has been frequently affirmed.[3]

Footnotes

1 In re Cox, 493 F.3d 1336 (11th Cir. 2007) (in light of circumstances); Ahern v. McCarthy, 107 Cal. 382, 40 P. 482 (1895); Ellis v. Hunnicutt, 71 Ga. 637, 1884 WL 2871 (1884); Nave v. Heinzmann, 344 Ill. App. 3d 815, 279 Ill. Dec. 829, 801 N.E.2d 121 (5th Dist. 2003) (circumstances surrounding the transaction); Reeder v. Gorsuch, 55 Kan. 553, 40 P. 897 (1895); Forester v. Van Auken, 12 N.D. 175, 96 N.W. 301 (1903) (by implication); Myers v. Eich, 2006 SD 69, 720 N.W.2d 76 (S.D. 2006) (depending on the surrounding circumstances).
Deciding whether a conveyance should be declared a mortgage under a statute deeming instruments conveying property for the purpose of securing the payment of money to be mortgages depends on the facts and circumstances surrounding the transaction. Bernstein v. New Beginnings Trustee, LLC, 988 So. 2d 90 (Fla. 4th DCA 2008).

2 Northern Cent. Ry. Co. v. Hering, 93 Md. 164, 48 A. 461 (1901), dismissed, 186 U.S. 480, 22 S. Ct. 944, 46 L. Ed. 1259 (1902); Holien v. Slee, 120 Minn. 261, 139 N.W. 493 (1913).
Any written or oral evidence tending to show the true facts of the transaction is admissible. Brown v. Cole, 27 Ark.

App. 213, 768 S.W.2d 549 (1989).

[3] Sherman v. Town of Chester, 339 F. Supp. 3d 346 (S.D. N.Y. 2018), appeal withdrawn, 2018 WL 7821086 (2d Cir. 2018); Harper v. T.N. Hays Co., 149 Ala. 174, 43 So. 360 (1907); Dusenbery v. Bidwell, 86 Kan. 666, 121 P. 1098 (1912); Beall v. Beall, 67 Or. 33, 135 P. 185 (1913); Mussey v. Bates, 65 Vt. 449, 27 A. 167 (1893).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

b. Proof

(1) In General

§ 84. Presumptions and burden of proof as to character of absolute conveyance as mortgage

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West's Key Number Digest

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The law presumes that a deed, absolute on its face, is what it appears to be.[1] Thus, the burden of introducing evidence to prove that an absolute conveyance, unaccompanied by any written stipulation for reconveyance, was intended to operate as a mortgage rests on the party alleging that intention.[2]

Footnotes

1 Henslee v. Ratliff, 66 Ark. App. 109, 989 S.W.2d 161 (1999); Sitek v. Striker, 764 N.W.2d 585 (Minn. Ct. App. 2009); Walker v. Brooks, 403 S.C. 212, 742 S.E.2d 869 (Ct. App. 2013), aff'd, 414 S.C. 343, 778 S.E.2d 477 (2015).

2 Johnson v. Washington, 559 F.3d 238 (4th Cir. 2009) (under Virginia law); Collins v. Overstreet, 959 So. 2d 102 (Ala. Civ. App. 2006); Henslee v. Ratliff, 66 Ark. App. 109, 989 S.W.2d 161 (1999); Knowles v. Edwards, 967 So. 2d 255 (Fla. 3d DCA 2007); Greene v. Bride & Son Const. Co., 252 Iowa 220, 106 N.W.2d 603 (1960); Peterson v. Johnson, 720 N.W.2d 833 (Minn. Ct. App. 2006); Mosley v. Cavanagh, 344 Mo. 236, 125 S.W.2d 852 (1939); Walker v. Brooks, 403 S.C. 212, 742 S.E.2d 869 (Ct. App. 2013), aff'd, 414 S.C. 343, 778 S.E.2d 477 (2015); Johnson v. Johnson, 183 Va. 892, 33 S.E.2d 784 (1945).

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Works.

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

b. Proof

(1) In General

§ 85. Standards and degree of proof as to character of absolute conveyance as mortgage

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West's Key Number Digest

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Evidence to prove that an instrument absolute on its face was intended by the parties as a mortgage is generally received by the courts with caution.[1] A high degree of proof is necessary.[2] The evidence must be, according to various statements, clear and convincing,[3] plain,[4] credible,[5] satisfactory,[6] unequivocal,[7] unambiguous,[8] and conclusive.[9] It will not suffice if composed of loose and random statements,[10] or facts and circumstances of doubtful import.[11]

Observation:

The reason for the exaction of this high degree of proof is not hard to find; if a less rigorous rule obtained, no one would be safe in taking a deed of property and when it had doubled or trebled in value it would be necessary only for the grantor to bring witnesses to testify to any agreement that the deed was intended as a mortgage, to enable him or her, on payment of the purchase price and interest, to redeem.[12]

Footnotes

[1] Corbit v. Smith, 7 Iowa 60, 7 Clarke 60, 1858 WL 218 (1858); Pahler v. Young, 232 S.W.2d 393 (Mo. 1950).

[2] Paul v. Mazzocco, 221 Or. 411, 351 P.2d 709 (1960).

[3] Collins v. Overstreet, 959 So. 2d 102 (Ala. Civ. App. 2006); Snider v. Snider, 357 P.3d 1180 (Alaska 2015); Silva v. Napier, 2017 Ark. App. 422, 528 S.W.3d 297 (2017) (clear, unequivocal, and convincing); Steuerer v. Richards, 155 Idaho 280, 311 P.3d 292 (2013); Hatchett v. W2X, Inc., 2013 IL App (1st) 121758, 373 Ill. Dec. 385, 993 N.E.2d 944 (App. Ct. 1st Dist. 2013) (clear, satisfactory and convincing); APAC-Mississippi, Inc. v. JHN, Inc., 818 So. 2d 1213 (Miss. Ct. App. 2002); Estate of Hammerle v. Director, Div. of Taxation, 22 N.J. Tax 342, 2005 WL 1278572 (2005); Myers v. Eich, 2006 SD 69, 720 N.W.2d 76 (S.D. 2006); Glauser Storage, L.L.C. v. Smedley, 2001 UT App 141, 27 P.3d 565 (Utah Ct. App. 2001).

[4] Rubenstine v. Powers, 215 Mich. 434, 184 N.W. 589 (1921); Sweek v. Bennett, 133 Or. 388, 290 P. 747 (1930); Wood v. De Winter, 280 S.W. 303 (Tex. Civ. App. Fort Worth 1926).

[5] Johnson v. Johnson, 183 Va. 892, 33 S.E.2d 784 (1945).

[6] Hatchett v. W2X, Inc., 2013 IL App (1st) 121758, 373 Ill. Dec. 385, 993 N.E.2d 944 (App. Ct. 1st Dist. 2013) (clear, satisfactory and convincing); Greene v. Bride & Son Const. Co., 252 Iowa 220, 106 N.W.2d 603 (1960); Rubenstine v. Powers, 215 Mich. 434, 184 N.W. 589 (1921); Sweek v. Bennett, 133 Or. 388, 290 P. 747 (1930); Wood v. De Winter, 280 S.W. 303 (Tex. Civ. App. Fort Worth 1926).

[7] Campbell v. Northwest Eckington Imp. Co., 229 U.S. 561, 33 S. Ct. 796, 57 L. Ed. 1330 (1913); Silva v. Napier, 2017 Ark. App. 422, 528 S.W.3d 297 (2017) (clear, unequivocal, and convincing); APAC-Mississippi, Inc. v. JHN, Inc., 818 So. 2d 1213 (Miss. Ct. App. 2002); Renas v. Green, 1923 OK 83, 88 Okla. 169, 212 P. 755 (1923); Sweek v. Bennett, 133 Or. 388, 290 P. 747 (1930); Wood v. De Winter, 280 S.W. 303 (Tex. Civ. App. Fort Worth 1926); McFadden v. French, 29 Wyo. 401, 213 P. 760 (1923).

[8] Rubenstine v. Powers, 215 Mich. 434, 184 N.W. 589 (1921); Sweek v. Bennett, 133 Or. 388, 290 P. 747 (1930); Wood v. De Winter, 280 S.W. 303 (Tex. Civ. App. Fort Worth 1926).

[9] Jackson v. Maxwell, 113 Me. 366, 94 A. 116 (1915); Rubenstine v. Powers, 215 Mich. 434, 184 N.W. 589 (1921); Abberton v. Stephens, 747 S.W.2d 334 (Mo. Ct. App. E.D. 1988) (clear, cogent, and convincing); Wood v. De Winter, 280 S.W. 303 (Tex. Civ. App. Fort Worth 1926).

[10] Ensminger v. Ensminger, 75 Iowa 89, 39 N.W. 208 (1888); Corbit v. Smith, 7 Iowa 60, 7 Clarke 60, 1858 WL 218 (1858); Rubenstine v. Powers, 215 Mich. 434, 184 N.W. 589 (1921).

[11] Rubenstine v. Powers, 215 Mich. 434, 184 N.W. 589 (1921).

[12] Rubenstine v. Powers, 215 Mich. 434, 184 N.W. 589 (1921); Paul v. Mazzocco, 221 Or. 411, 351 P.2d 709 (1960).

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

b. Proof

(1) In General

§ 86. Rule in cases involving doubt as to whether transaction contemplated was absolute conveyance or mortgage

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Where the issue raised is simply whether the transaction contemplated was a mortgage or an unconditional transfer, it should be held to be the latter if on the whole testimony its quality remains doubtful.[1] There are, however, some decisions which have proceeded on an opposite theory.[2]

Footnotes

1 Cadman v. Peter, 118 U.S. 73, 6 S. Ct. 957, 30 L. Ed. 78 (1886) (wherein the evidence was held insufficient to establish the instrument as a mortgage); Harmon v. Grants Pass Banking & Trust Co., 60 Or. 69, 118 P. 188 (1911).

2 Reed v. Reed, 75 Me. 264, 1883 WL 3439 (1883); Schmidt v. Barclay, 161 Mich. 1, 125 N.W. 729 (1910); Vangilder v. Hoffman, 22 W. Va. 1, 1883 WL 3223 (1883).
When it is shown by clear and convincing evidence that a deed absolute on its face is part of a transaction other than an absolute conveyance, and doubt then exists as to whether it is a mortgage, the court will hold it to be a mortgage. Mechtle v. Topp, 78 N.D. 789, 52 N.W.2d 842 (1952).

Works.

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III. Types of Mortgages; Conveyance as Mortgage

C. Absolute Deed or Other Conveyance as Mortgage

2. Actions

b. Proof

(2) Parol or Extrinsic Proof

§ 87. Admissibility of parol or extrinsic proof as to character of absolute conveyance as mortgage, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

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It is necessary to look beyond the four corners of some conveyances;[1] in the absence of a statutory provision to the contrary, parol evidence is admissible to show that a deed absolute in form was intended as a mortgage.[2] If it appears that the parties' intent was to convey and receive property as security for the fulfillment of an obligation, the form of the instrument becomes immaterial and the true nature of the transaction may be shown by parol evidence.[3]

Observation:

The exception to the rigidity with which deeds are ordinarily construed, which allows a party to show by parol evidence that a deed was given for security purposes only, protects debtors who frequently execute absolute deeds of conveyance to creditors with merely an oral understanding that the creditor will hold the deed only as security.[4]

In a few instances, however, the rule admitting parol evidence has been entirely or partially abrogated by statute.[5]

Footnotes

[1] In re Cox, 493 F.3d 1336 (11th Cir. 2007).

[2] Cabrera v. American Colonial Bank, 214 U.S. 224, 29 S. Ct. 623, 53 L. Ed. 974 (1909); Ocklawaha River Farms Co. v. Young, 73 Fla. 159, 74 So. 644 (1917); Hogg v. Wolske, 142 Idaho 549, 130 P.3d 1087 (2006); Steckelberg v. Randolph, 404 N.W.2d 144 (Iowa 1987); Stinson v. Hall, 938 So. 2d 887 (Miss. Ct. App. 2006); Henley v. Foreclosure Sales, Inc., 39 A.D.3d 470, 835 N.Y.S.2d 599 (2d Dep't 2007) (examination may be made of oral testimony bearing on the intent of the parties); Morrison v. Christie, 266 S.W.3d 89 (Tex. App. Fort Worth 2008); First American Title Ins. Co. v. Firriolo, 225 W. Va. 688, 695 S.E.2d 918 (2010); Maslowski v. Bitter, 12 Wis. 2d 337, 107 N.W.2d 197, 89 A.L.R.2d 1035 (1961).

[3] Swenson v. Mills, 198 Or. App. 236, 108 P.3d 77 (2005).

[4] Glauser Storage, L.L.C. v. Smedley, 2001 UT App 141, 27 P.3d 565 (Utah Ct. App. 2001).

[5] Nix v. Nix, 210 Miss. 821, 50 So. 2d 396 (1951); Barker v. Barker, 62 N.H. 366, 1882 WL 4425 (1882); Potter v. Langstrath, 151 Pa. 216, 25 A. 76 (1892).

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